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Supreme Court of the United States

OCTOBER TERM, A.D. 1961

No. 665

WOODMAR REALTY COMPANY, a Corporation, Debtor,

Petitioner,

vs.

WALTER A. McLEAN, Trustee, and HERSCHEL B. DAVIS, Trustee's Attorney,

Respondents.

* * * * *

In the Matter of the WOODMAR REALTY COMPANY, a Corporation, Debtor. } In Proceedings for the Reorganization of a Corporation.

Petition For Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit (Opinion below is appended hereto)

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Petition For Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit (Opinion below is appended hereto)

To The Honorable, The Chief Justice and Associate Justices of The Supreme Court of the United States:

The above named Petitioner, as the Debtor Corporation in a 21 year old Chapter X reorganization, respectfully petitions this Court to issue its writ of certiorari to said Court of Appeals to review that Court's judgment affirming an order of the United States District Court for the Northern District of Indiana which dismissed your peti-

tioner-debtor's amended petition for the removal of Walter A. McLean and Herschel B. Davis, as Trustee and Trustee's Attorney, respectively, without a hearing on the merits, on the principal ground that said amended removal petition did not allege sufficient facts to constitute grounds in law for their removal.

OPINIONS BELOW.

The opinion of the Court of Appeals, set forth in the Appendix of this petition at pages 6a through 28a, is reported in:

> In the Matter of Woodmar Realty Corporation. Debtor,
>
> * * * * * *
>
> Woodmar Realty Company, a Corporation, Appellant, v. Walter A. McLean, Trustee, and Herschel B. Davis, Trustee's Attorney (C. A. 7, 1961). 294 F. 2d 785.

The opinion was modified by order of court entered on October 2, 1961. The order modifying the original opinion of June 23, 1961 is set out in the appendix, infra, at pages 1a through 3a, and the "Order on Petition for Rehearing" is set out at pages 4a through 5a of the appendix, infra. The opinion of the District Court is reprinted at pages 248 through 284 of petitioner's (appellant's) appendix filed in the Court of Appeals on February 10, 1961, and certified to as part of the record under Supreme Court Rule 21(3).

GROUNDS FOR INVOKING THIS COURT'S JURISDICTION.

This Court's general jurisdiction to review final orders of the Court of Appeals in reorganization and bankruptcy cases is invoked.

The Court of Appeals rendered its opinion and judgment of affirmance on June 23, 1961, following which a timely petition for rehearing by this petitioner-debtor was filed. Simultaneously with the filing of the petition for rehearing, your petitioner filed a motion to strike and expunge a portion of the Court's opinion dated June 23, 1961. (Record, pages 5 through 24, inclusive.) Both the petition for rehearing and motion to strike and expunge were entertained and denied on the merits on October 2, 1961. Within the 90 days allowed for the filing of a petition for a writ of certiorari and on December 29, 1961, the time was extended by order entered by Mr. Justice Tom C. Clark to and including January 15, 1962. The petition is being filed on January 15, 1962.

This Court's jurisdiction is based upon 11 U.S.C., (Bankruptcy), §47 and 28 U.S.C. 1254(1).

QUESTIONS PRESENTED FOR REVIEW.

(1) Whether of not the Woodmar Realty Company, as the corporate debtor in a 21-year old reorganization, is entitled to a hearing on the merits of its amended petition to remove the court-appointed trustee and trustee's attorney, who have been in office for 9 years and 11½ years respectively, wherein the petition charges them with:

(a) Being parties to a conspiracy to perpetrate a fraud on the United States District Court and the Woodmar Realty Company by procuring ex parte orders attempting to misappropriate the debtor's assets ($457,000 in cash);

(b) Failure to protect the assets in their custody against hostile lien claims and joining with attorneys for alleged lien claimants to suppress defenses against the adverse lien claims existing in favor of petitioner;

(c) Failure to report criminal acts of former fiduciaries to the District Attorney and to take steps to recover damages for the benefit of the estate growing out of the criminal conduct of former court-appointed fiduciaries; and

(d) Failure to take steps to terminate this unprecedented litigation, and, interfering with the efforts of the parties in interest to bring the proceedings to a close.

(2) Whether Rule 9(b) of the Federal Rules of Civil Procedure authorized the dismissal, for alleged lack of particularity and without a hearing on the merits, of the petition to remove the trustee and trustee's attorney, where the amended petition is forty-six (46) printed pages in length and incorporates, by reference, a Bill of Particulars one hundred (100) printed pages in length.

(3) Whether the District Court was authorized to dismiss a debtor's removal petition without a hearing on the merits, as alleged punishment for contempt or near contempt of one of three lawyers who signed the petition along with the debtor company's president (no claim of contempt or near-contempt having been previously filed, made, or suggested, or opportunity afforded to be heard on the subject, the assertion being made for the first time in the District Court's opinion filed 2 years and 5 months after the petition to remove the trustee was filed).

CONSTITUTIONAL PROVISIONS, RULES, ETC., INVOLVED.

The only constitutional provision which might be involved is that part of the Fifth Amendment to the Constitution of the United States, reading:

> "No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *" (Our emphasis)

On the subject of due process, all of petitioner's substantial assets have been (and are) in the custody of two successive court-appointed trustees for over twenty-one (21) years. Many of its original 44 stockholders have died, pendente lite, since the proceedings were commenced. The founder and first president of your petitioning company died on the witness stand on May 29, 1951, during a hearing on fiduciaries' fees. Although, under the law of the case as established in two earlier successful appeals (In the Matter of the Woodmar Realty Company, [C. A. 7, 1957] 241 F. 2d 768 and [1960] 284 F. 2d 815), petitioner and City of Hammond, Indiana, improvement-bondholders are the only parties in interest, none of the parties in interest are able

to obtain hearings on their controversies or have settlement stipulations consummated although they have been technically "approved" by the District Court.

Pertinent statutes governing the problem of the removal of court-appointed trustees are as follows:

Chapter X (Reorganization) of the Bankruptcy Act provides, in pertinent part:

> "Sec. 160. In any case, the judge at any time, without or upon cause shown, may appoint additional trustees or remove trustees and appoint substitute trustees." (11 U.S.C.A. 560).

Chapter II of the Bankruptcy Act gives District Courts jurisdiction in equity to:

> "Sec 2(a) (17): * * * upon their own motion, **remove for cause** receivers or trustees upon hearing after notice;" 11 U.S.C.A. 2(a) (17)

Rule 9(b) of the Federal Rules of Civil Procedure, invoked by the Court of Appeals as a secondary basis for sustaining the dismissal of the amended removal petition, is as follows:

> "(b) Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." 28 U.S.C.A. Rule 9, page 17.

The Amended Removal Petition alleges that the former Trustee's sales agent, S. C. Ennis & Company, sold a large portion of the debtor's real estate to its own building corporation, Home Builders, Inc., and that Richard F. Zilky and Donald C. Gardner, while members of the court-appointed Bondholders' Committee, made similar purchases from the trustee in violation of 18 U.S.C.A. 154:

> "Whoever, being * * * or other officer of the court, knowingly, purchases, directly or indirectly, any prop-

erty of the estate of which he is such officer in a bankruptcy proceedings; etc. * * *

"Shall be fined not more than $500, and shall forfeit his office, which shall thereupon become vacant."

The duty of the Trustee to report violations of criminal law is provided for in 18 U.S.C.A. 3057:

"Title 18, U.S.C., Chap. 203, §3057.

§3057. Bankruptcy Investigations. (a) Any referee, receiver, or trustee having reasonable grounds for believing that any violations of the bankruptcy laws or other laws of the United States relating to insolvent debtors, receiverships or reorganization plans has been committed, or that an investigation should be had in connection therewith, shall report to the appropriate United States attorney all the facts and circumstances of the case, the names of the witnesses and the offense or offenses believed to have been committed. Where one of such officers has made such report, the others need not do so.

(b) The United States attorney thereupon shall inquire into the facts and report thereon to the referee, and if it appears probable that any such offense has been committed, shall without delay, present the matter to the grand jury, unless upon inquiry and examination he decides that the ends of public justice do not require investigation or prosecution, in which case he shall report the facts to the Attorney General for his direction."

Concise Statement of the Case.

The jurisdiction of the District Court for the Northern District of Indiana was invoked on January 13, 1941, under the Chandler Act (Chapter X of the Bankruptcy Act) for the purpose of reorganization of your petitioner, an Indiana corporation engaged in the real estate business. A trustee, Charles L. Surprise, was appointed on January 21, 1941. An Amended Plan of Reorganization was adopted on July 3, 1941, consented to by the six classes of reorganization creditors (including the stockholders) and confirmed by order of the District Court entered on November 22, 1941. (These facts and orders appear in the printed transcript of the record in the first appeal being Cause No. 11783 of the Court of Appeals and reported in 241 F. 2d 768. By order of the Court of Appeals, the use of this printed record was authorized as a "partial appendix" in the current appeal to avoid unnecessary printing costs. It constitutes part of the record filed in the Supreme Court in support of the petition for certiorari.)

During the first year that these proceedings were pending, the class one claims (general delinquent real estate taxes) and the class three claims ($300,000 in mortgage bonds secured by a trust deed) were compromised and paid pursuant to the terms of the Reorganization Plan. Your petitioner's assets were used for this purpose. In subsequent years, the class four claims (judgment creditors) and class five (unsecured creditors) were disposed of through the efforts of the Woodmar Realty Company. The only problem which is and has been confronting the District Court since at least April of 1951 has been the disposition of the class two, or City of Hammond special improvement bond, claims. As correctly stated by the District

Court in its opinion of October 21, 1960, dismissing the Amended Removal Petition:

> "Therefore, with the Class 1 real estate taxes and the Class 3 mortgage bondholder claims out of the way, the only substantial barrier that stood and now stands between the stockholders of this long inactive corporation and the assets was and is the Class 2 improvement bond claims." (Appellant's appendix in the Court of Appeals, pages 251 and 252.)

The first trustee, Charles L. Surprise, and the first Trustee's attorney, Carl A. Huebner, not only had but acquired, pendente lite, secret, undisclosed interests in defaulted City of Hammond special improvement bonds, being Class 2 lien claims. Carl A. Huebner temporarily withdrew as trustee's attorney on May 19, 1950, following a perjury conviction in the Lake County Indiana Criminal Court. He was subsequently disbarred. *In re Huebner* (1954) 233 Ind. 363, 118 N.E. 2d 898. Surprise was removed on December 3, 1952, following a prolonged hearing on a removal petition (and other issues) filed by your petitioner, as the Debtor company. The present trustee's attorney, respondent Herschel B. Davis, and Carl A. Huebner's brother and law partner, Arnold G. Huebner, were appointed Trustee's attorneys on May 23, 1950. Respondent Walter A. McLean was appointed successor trustee on December 22, 1952, three weeks after the removal of Surprise.

Trustee Surprise and the special improvement "Bondholder's Committee" made no effort to consummate the Reorganization Plan through the issuance of stock as called for. Instead, they liquidated all of your petitioner's assets consisting of a square mile of improved and subdivided business and residential property valued at $2,350,000 in the Trustee's Financial Report held on March 20, 1941. After the liquidation was completed (December of 1950), the fiduciaries filed fee petitions aggregating $287,000 out of

cash assets of $491,988.56 and proposed an amendment to the Reorganization Plan authorizing the distribution of the residue of the cash, or $196,000, to the undisclosed holders of special improvement bonds, a large portion of which had been purchased, secretly and pendente lite, by the fiduciaries themselves.

The debtor's (Woodmar Realty Company's) objections to the fee applications (unobjected to by the fiduciaries) and distribution plan were sustained in principal part, by the December 3, 1952 order. The fiduciaries did not appeal. Ten out of eleven of the fiduciaries were removed on application of the Woodmar Realty Company. No petition for removal was filed against respondent Herschel B. Davis, the eleventh fiduciary. Of cash assets of $491,988.56 on hand when Surprise and the fiduciaries filed their fee applications shortly prior to April 16, 1961 when the hearings were commenced, $481,008.11 was kept intact when respondent Walter A. McLean was appointed on December 22, 1952. Approximately $457,000 remains on hand today in a non-interest bearing account in the Gary National Bank where it has been for over eleven years.

Trustee Surprise having failed to file objections to special improvement bond claims in accordance with the report of Special Master Charles A. Burnett filed on November 11, 1941, and the confirmation order of November 22, 1941, the Woodmar Realty Company undertook to do so on its own behalf as early as February of 1952. With leave of Court, 274 separate sets of objections were filed by December 2, 1955. These were stricken on motion of trustee McLean and certain attorneys allegedly representing special improvement bondholders on the ground that your petitioner "was not a party in interest". This order, entered on March 5, 1956, was reversed by the Court of Appeals on February 27,

1957. *In the Matter of the Woodmar Realty Company* (1957), 241 F. 2d 768, 64 A.L.R. 2d 883.

On remand, a pre-trial conference was held in Lafayette, Indiana, before the late W. Lynn Parkinson as District Judge and on notice to all parties in interest. This conference was held on June 28, 1957. One of the lien claims, claim 445, was set for pre-trial on July 10, 1957 and trial on July 15, 1957. Neither the trustee nor the trustee's attorney attended or participated in the trial. Judge Parkinson was elevated to the Court of Appeals in early September of 1957, before he had had an opportunity to render a decision on the claim.

With the mutual consent of all parties in interest expressed at the pre-trial conference, your petitioner undertook to conduct settlement negotiations with the various special improvement bond claimants. The trustee and trustee's attorney, respondents McLean and Davis, were directed to step aside during these negotiations. The question of the approval of 102 settlement stipulations was submitted to Judge Parkinson's successor, Honorable Robert E. Tehan of Milwaukee, acting under assignment by the Chief Judge of the Court of Appeals, in January of 1958. His order disapproving the settlement stipulations, entered on January 19, 1960, was reversed on appeal. *In the Matter of the Woodmar Realty Company* (Nov., 1960), 284 F. 2d 815. Following the filing of an original action in mandamus, the District Court, on July 21, 1961, entered an order "approving" the settlement stipulations. But no orders carrying out the provisions of the 102 settlement stipulations have been entered. An appeal from an order disapproving eleven further and additional settlement stipulations, entered on August 17, 1961, without either notice or hearing, is presently pending in the Court

of Appeals as well as an appeal from an order denying thirty-three (33) separate motions to strike and dismiss thirty-three (33) abandoned and duplicated lien claims. (The motions and settlement stipulations were unopposed in the District Court.)

Requests for hearings on the remaining 150 special improvement bond claims have been ignored, although no objected to. Despite the fact that the special improvement bond claims, all similar in nature, have been at issue, and require adversary hearings, only one lien claim, Claim No. 441, supra, has been heard in 21 years. The District Court, on July 21, 1961, entered findings on this claim but no final appealable order. The findings were entered in discharge of a rule to show cause entered by the Court of Appeals in an original action in mandamus filed in August of 1969, three years after the lien claims had been heard.

Your petitioner first filed a petition to remove the respondent trustee and respondent trustee's attorney on June 27, 1957, following the filing of the mandate of the Court of Appeals in 241 F. 2d 768, in the District Court. This petition was ordered withdrawn without prejudice on July 17, 1957. (Appellant's appendix, Court of Appeals, Cause No. 13215, page 18). Your petitioner refiled the removal petition on May 19, 1958, in accordance with the following pertinent comments made by the District Judge at a conference in Milwaukee on April 24, 1958:

> "The Court: I see, Mr. Crumpacker, I am going to make an observation now, that in many of your letters here you have associated the Trustee and his attorney with fraud. Now, I feel that there is one thing you must do. You either must bring the charge—
>
> Mr. Crumpacker: Yes.
>
> The Court: (Continuing)—or refrain from using it. I just can't conceive—it puts the Court in a posi-

tion that's most awkward. In other words, if there is substance—after all, I did not appoint the Trustee, I only met him in passing down there; I shook his hand there in the presence of everybody—but I think it is utterly improper for us to have, either orally or in writing, charges made without formally bringing the charges. So that the court will determine once and for all. Because I cannot conceive that this court can stand by idly and have these suggestions made that a person in a fiduciary capacity and an appointee of the court is acting fraudulently and not stirring on one's own motion to do it. I don't just conceive how I can tolerate it."

The respondents filed answer on the merits on June 17, 1958, and, with the issues closed, the petition was ordered set for hearing on the merits on July 30, 1958. In preparation for the hearing and to facilitate the same, your petitioner served and filed approximately 103 separate documents and transcripts, requesting that the respondents admit the genuineness of the same in accordance with the Rules of Civil Procedure.

On the hearing date, June 30, 1958, the District Court, sua sponte, ordered the petition amended to conform to Rule 9(b), so that the Court's task of passing on the relevance of the 103 documents and transcripts would be facilitated:

> "You should make specifications, particularizations, in this case so that I in turn may properly see whether or not many of these matters that are brought before us on request to admit or deny genuineness have any possible relevance to it."

In compliance with the District Court's order, your petitioner filed an Amended Petition 46 pages in length (Appellant's appendix in Cause No. 13215, pages 39 through 85) supported by a Bill of Particulars 87 printed

pages in length (Appellant's appendix in Cause No. 13215, pages 98 through 185). The respondents, who had previously filed answer on the merits, then filed a motion to dismiss the Amended Removal Petition on the sole ground that, we quote, "said petition fails to state facts against said respondents, warranting their removal". (Appellant's appendix, in Cause No. 13215, page 187.)

The motion to dismiss was argued on May 21, 1960. On October 21, 1960, in discharge of a rule to show cause entered by the Court of Appeals in a further original action in mandamus filed in August of 1960, the District Judge granted the motion to dismiss, supporting it with a lengthy opinion. (Appellant's appendix in Cause No. 13215, pages 247 through 284.)

On appeal, both petitioners and respondents were in agreement in admitting that there was only one contested issue involved. To quote the respondents' answer brief filed in the Court of Appeals:

"Contested Issue.

> The only issue here involved is whether or not the amended petition to remove Trustee Walter A. McLean and Trustee's Attorney, Herschel B. Davis, and restore Woodmar Realty Company to possession of its assets states facts sufficient to warrant their removal."

The opinion rendered by the Court of Appeals in support of the decision sought to be reviewed on certiorari does not discuss or decide the sole "contested issue" actually presented, but devotes itself, largely, to a castigation of one of the three attorneys for the Woodmar Realty Company, all of whom participated equally and in the same manner in signing, filing and unsuccessfully attempting to obtain a hearing on the merits of the petition

to remove the trustee and trustee's attorney. This was done solely in discharge of what the petitioner's attorneys believed to be their duty to the court and to their client.

At the first opportunity afforded on the subject, and on July 14, 1961, petitioner filed its verified "Motion to Strike and Expunge From Opinion and Decision: (1) Scandalous and Libelous Statements Concerning One of Appellants' Counsel and (2) Determinations, By Obiter Dicta, of Questions Not Raised On Appeal and Presently Pending before District Judge Tehan. The opinion was corrected in certain particulars by order entered on October 2, 1961, but no action taken with regard to the scandalous and libelous statements.

ARGUMENT.

I.

Your petitioner, the Woodmar Realty Company, was initially prevented from having a hearing on the merits of its petition to remove the respondents solely by act of the District Judge himself. With the Removal Petition at issue on the merits by the filing of an answer alleging three defenses, and on the day set for hearing (July 30, 1958) by order of court previously entered, and with the parties present, both in person and by counsel, the hearing was forestalled. The District Judge, on his own motion, prevented the hearing by ordering Woodmar's petition amended. ("I ordered the petitioner to redraft and submit an amended petition which would comply with Rule 9(b) of the Federal Rules of Civil Procedure by stating with particularity the circumstances constituting fraud and mistake". Appellant's Appendix in Court of Appeals No. 13215, p. 277.) This ruling not only compelled your petitioner to file an amended petition but afforded the respondents the opportunity to, later, file their motion to dismiss for want of allegations of fact. Petitioner was unable to obtain an argument on the motion to dismiss for an additional 10 months (until May 21, 1959). A decision was not forthcoming on the motion to dismiss for an additional 1 year and 5 months (October 21, 1960). The order dismissing the Amended Removal Petition was entered only in discharge of a rule to show cause issued against the District Judge on September 7, 1960, in an original action in mandamus filed in the Court of Appeals for the Seventh Circuit to compel a ruling. (The only orders entered by the present District Judge in this 21 year old proceedings have been entered either in discharge of three separate

rules to show cause or in avoidance of the issuance of six additional rules to show cause in connection with a total of nine original actions in mandamus.)

That the Amended Petition does allege grounds in law for the removal of the respondents can be readily observed by an inspection of the petition itself. That the Amended Petition fully complies with Rule 9(b) in fact can also be readily ascertained from an inspection of the Amended Petition, the extensive Bill of Particulars, and the further fact that respondents were sufficiently informed by adequate information as to the charges made against them to enable them to file answer on the merits even before the removal petition was amended and the Bill of Particulars filed.

In order to present the impelling need for the issuance of a writ of certiorari, your petitioner has heretofore undertaken to set out a concise statement of facts pertaining to a proceedings that have been pending in court for an unprecedented length of time, to-wit: 21 years. This is a somewhat difficult task in a 21 year old proceeding, from the standpoint of brevity in spite of the fact that the actual issues facing the District Court are and always have been simple and uncomplicated.

The Amended Removal Petition, although somewhat lengthy, is set out verbatim at pages 39-85 of the printed "Appellant's Appendix" filed in the Court of Appeals in the appeal from the District Court's dismissal order, supra. Nine copies of this document have been filed under Rule 21(4). The Bill of Particulars, duly indexed as a "List of Exhibits", appears at pages 86-185, inclusive, of the same document. Nine copies of the "Appellees' Appendix" in Cause No. 13215 have, likewise, been filed under Rule 21(4).

Because of the unprecedented nature of the decision and opinion of the Court of Appeals sought to be reviewed, your petitioner filed an 80-page "Petition for Rehearing" with a 70-page printed Appendix attached. The Petition for Rehearing contains an analysis of the salient facts set out in the Amended Removal Petition and Bill of Particulars which the opinion of the Court of Appeals either misstates or has ignored. For this reason, nine printed copies of the Petition for Rehearing have been filed for consideration under Rule 21(4). Only one printed copy of the transcript of record and supplemental transcript of record in the first appeal, Cause No. 11783, were available. Since this set of printed transcripts was authorized to be and constitute a partial printed appendix in the present, and third appeal, one copy has been certified to and filed under Rule 21(1). Likewise, only one copy of your petitioner's Motion to Strike and Expunge parts of the opinion of the Court of Appeals was available for certification under Rule 21(1). (See certified record in the Supreme Court, pages 5 through 24, inclusive.)

II.

The decision of the Court of Appeals for the Seventh Circuit has sanctioned such a departure from the accepted and usual course of judicial proceeding by the District Court as to call for an exercise of this Court's power of supervision.

A bankruptcy court necessarily, *must maintain complete supervisory power* over its administrative officer, the trustee. Because of this complete supervisory power, there is no existing precedent for the decision of the Court of Appeals in the present case.

No prior decision or precedent has sanctioned the action of a trustee and trustee's attorney *in foreclosing an inquiry into their conduct by the District Court* through the device of filing a motion to dismiss as has been done in the instant case. The motion to dismiss *alleges only* that the "petition fails to state facts against said respondents warranting their removal". Since *this* District Court had the statutory power to remove the trustee without cause, the *test* of what allegations constitute grounds in law for removal must, therefore, depend *solely and exclusively* on the judicial conscience of the particular Bankruptcy Judge as a court of equity under the unusual precedent established by the Court of Appeals in the instant case.

Previously, and on April 24, 1958, in Milwaukee, Wisconsin, the District Judge, Robert E. Tehan, made the following pertinent comment:

> "* * * the case has a special challenge and certainly aggravated in the way of time—we had lunch again today with the Chief Judge (sic—Hon. F. Ryan Duffy); **he thinks it's the worst situation in the country** and I should address myself to that case." (Appellant's Appendix in No. 13215, page 30)

That the respondents are responsible for the situation appears in the opinion of one panel of the Court of Appeals under date of November 23, in the second appeal, 1960, reversing the District Court's order refusing to approve 102 settlement sitpulations:

> "This litigation is being prolonged by a trustee in bankruptcy who is the second in a succession of trustees who have been administering this trust since the early part of 1941."
>
> (*In the Matter of Woodmar Realty Co.* (1960), 284 F. 2d 815, at page 821).

(The trustee's petition for rehearing *en banc* was acted upon by the Court of Appeals *en banc* and denied, Judge F. Ryan Duffy dissenting.)

That the trustee, Walter A. McLean, has been in sole and exclusive possession of your petitioner's assets since December 22, 1952, is without dispute. That the only parties in interest, the City of Hammond improvement bondholders on the one hand, and the Woodmar Realty Company on the other, have been able to have only one lien claim out of 300 (Claim No. 441 on July 15 and 16, 1957) heard in 21 years is also without dispute. (No final order has yet been entered even in claim No. 441.) Likewise, it is true that the only hearing at which the parties were permitted to introduce evidence since the present District Judge was assigned to the case on December 27, 1957, was the hearing held in May and July of 1958 on the question of the approval of 102 settlement stipulations to which no one made objection in the District Court. The ultimate decision of the District Court was reversed on appeal (284 F. 2d 815), but the District Court and the trustee have refused to permit the settlement stipulations to be consummated in accordance with their terms.

The Court of Appeals, by its opinion of June 23, 1961, has signified its willingness that the "worst situation in the country" shall continue indefinitely. If the sole parties in interest in a $457,000 trust fund *are deprived of their right* to either try their claims or to settle them, the exercise of this Court's supervisory power is *essential to the public interest in the administration of justice.*

Continued possession of all of your petitioner's assets by two successive, court-appointed trustees for 21 years, with the doors of the District Court closed to the parties in interest, conclusively demonstrates that the administ-

tration of justice has broken down in the Northern District of Indiana. Failure to permit a hearing on the question of the removal of the second of the two trustees, who has successfully defeated the rights of the parties to either have hearings on lien claims or have their settlement stipulations consummated, is an important factor in the denial of due process by the District Court as guaranteed by the Fifth Amendment to the Constitution of the United States. As stated by this Court in *County of Allegheny* v. *Frank Mashuda Company* (1959), 360 U.S. 185, at page 197, 79 S. Ct. 1060, at page 1067:

> "It exacts a severe penalty from citizens for their attempt to exercise rights of access to the federal courts granted them by Congress to deny them 'that promptness of decision which in all judicial actions is one of the elements of justice'. *Forsyth* v. *City of Hammond*, 166 U.S. 506, 513, 17 S. Ct. 655, 688, 41 L. Ed. 1095."

III.

The allegations of a conspiracy to perpetrate a fraud on the District Court in a twenty-one-year old reorganization make a hearing on the merits of the petition essential from the standpoint of the integrity of the District Court. The parties charged as participants should not be permitted to foreclose a hearing by motion to dismiss for want of facts.

The opinion of the Court of Appeals sought to be reviewed correctly summarizes some of the important charges alleged against respondents:

> "Appellant's amended petition, filed on January 7, 1959, charged that appellees had perpetrated, and were perpetrating a fraud on the Court and Woodmar and requested that appellees be removed by the Court

as trustee in bankruptcy and as counsel, respectively." (Opinion, page 2)

* * * * *

"Thus it is alleged that Surprise, and others, conspired to perpetrate a fraud upon the court and appellant in order to obtain the initial finding of appellant's insolvency, to have themselves appointed as fiduciaries having control of appellant's property, and thereafter, to dispose of and distribute appellant's property to class 2 claimants to their own benefit and profit." (Opinion, page 7)

* * * * *

"* * * allegations that appellees did not file objections to all of the class 2 claims, that they sought to suppress defenses to those claims by filing the trustee's final report in 1955 proposing the distribution of a substantial part of the funds in the hands of the trustee in satisfaction thereof and that appellees sought to prevent appellant from protecting the estate against those lien claims by moving to strike appellant's objections thereto. It is contended that each of those allegations supports appellant's conclusions that appellees are continuing a fraudulent scheme which began with Surprise, et al." (Opinion, page 14)

Respondent's Motion to Dismiss for want of facts addressed to the Amended Removal Petition, under well accepted precedents, admits the truth and existence of the facts pleaded. *Land* v. *Dollar* (1947) 330 U.S. 731, 67 S. Ct. 1009; *Carroll* v. *Morrison Hotel Corp.* (C.C.A. 7, 1945), 149 F. 2d 404; *Chicago & N. W. Ry. Co.* v. *First Nat'l. Bank* (C.C.A. 7, 1953); 200 F. 2d 383; *Mott* v. *City of Flora* (D.C., Ill., 1943), 3 F.R.D. 282.

Tampering with the administration of justice in the manner shown by the Amended Removal Petition is a

matter of great public concern. Under established precedents, which the District Court and Court of Appeals have contravened, the District Court was and is under an inherent, compelling duty to investigate the charges on the merits. *Hazel-Atlas Glass Co.* v. *Hartford Empire Co.* (1944), 322 U.S. 238, 64 S. Ct. 997, 88 L. Ed. 1250; *Universal Oil Products Co.* v. *Root Refining Co.* (1946), 328 U.S. 575, 66 S. Ct. 1176.

Furthermore, the allegations of the Amended Petition and the facts hereinabove quoted from the opinion of the Court of Appeals establish that the respondent trustee and the respondent trustee's attorney (charged as a principal) have been attempting, for at least 9 years, to represent certain security holders (City of Hammond's special improvement bondholders) in asserting lien rights against the assets in the custody of the trustee. That this conduct is in patent violation of the trustee's duty to protect the trust estate against hostile, adverse lien claims is apparent. In affirming the dismissal of the Amended Removal Petition, without a hearing on the merits, the Court of Appeals has set a standard of conduct for federal-court fiduciaries far below the standards previously insisted upon. A leading precedent of this Honorable Court, to-wit: *Woods* v. *City National Bank & Trust Co.* (1941), 312 U.S. 262 at page 269, 61 S. Ct. 493, at page 497, is contravened. We quote the rule of law established by this Court in the *Woods case, supra, as* follows:

> "A fiduciary who represents *security holders* in a reorganization may not perfect his claim to compensation by insisting that although he had conflicting interests, he served his several masters equally well or that his primary loyalty was not weakened by the pull of his secondary one. Only strict adherence to these equitable principles can keep the standard of conduct for fiduciaries 'at a level higher than that

trodden by the crowd'. See Mr. Justice Cardozo in *Meinhard* v. *Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 546, 62 A.L.R. 1." (Emphasis added)

The breach of duty pleaded in the Amended Removal Petition is far more aggravated than the mere existence of conflicts of interest described in the *Woods case, supra*. In the present case, not only have the present trustee, respondent McLean, and the former trustee, Surprise, undertaken to represent hostile, adverse lien claims, but they have actively conspired and confederated with certain of the attorneys, allegedly representing City of Hammond special improvement bondholders, to suppress defenses. The two trustees failed and refused to file objections to the lien claims in accordance with the District Court's order of November 21, 1941. When the Woodmar Realty Company, with leave of court granted on November 10, 1955, undertook to file objections to the lien claims on behalf of the estate and force adversary hearings on the same, respondents filed motions to strike the objections, as did certain of the attorneys representing lien claimants, which motions were sustained by the District Court on March 5, 1956. This conduct necessitated the first appeal decided in favor of the Woodmar Realty Company on February 27, 1957. *In the Matter of the Woodmar Realty Company* (1957), 241 F. 2d 768. This decision and opinion were required before your petitioner could even establish the right to be heard on matters affecting the distribution of its assets, and to avoid attempting to speak through the mouth of the hostile trustee. (Respondents contended that the debtor company, the reorganization of which was the basic foundation for the District Court's jurisdiction in the first place, was not even a "party in interest".)

Further, the Woodmar Realty Company, under the allegations of the Amended Petition, has repeatedly called the attention of the respondents to the devastation of petitioner's assets through a fraudulent sales program participated in by the attorney for the Bondholder's Committee, Donald C. Gardner, a member of the Bondholder's Committee, Richard F. Zilky, and the Court-appointed trustee's sales agent, S. C. Ennis & Company, the sales agent receiving 15% commissions. Approximately ½ of petitioner's assets were sold by trustee Surprise to Home Builders, Inc., a subsidiary of the sales agent, Donald C. Gardner, and Richard F. Zilky, for nominal prices and in violation of criminal statutes adopted by Congress to protect the integrity of bankruptcy and reorganization trusteeships. 18 U.S.C.A. 154. Congress placed a mandatory duty upon respondents to report these acts and this conduct to the United States Attorney. 18 U.S.C.A. 3057. (The statutes have been quoted verbatim heretofore.)

The misconduct of the respondents in failing to protect the integrity of the District Court against violations of the criminal law and to take steps to recover the damages occasioned thereby is so flagrant that the opinion of the Court of Appeals, in affirming the dismissal of the charges against the respondents without a hearing on the merits, does not even mention the existence of the charges. The allegations in this regard appear under captions VII & VIII of the Amended Petition (Appellant's Appendix in No. 13215, pages 83 and 84) and in the Bill of Particulars (Appellant's Appendix in No. 13215, pages 107-109, inclusive, and pages 169 and 170).

IV.

The Court of Appeals has committed reversible error in contravention of precedents in affirming the dismissal of the Amended Removal Petition (*and thus depriving Woodmar of a hearing on the merits*) for alleged failure to comply with Rule 9(b) of the Rules of Civil Procedure.

Without setting forth the actual facts as pleaded, the Court of Appeals, in attempted justification for the affirmance of the order of the District Court, makes this statement, relative to said Rule 9(b):

> "We have reviewed the record and the amended petition carefully and are convinced that the petition is so wanting in sufficient allegations of fact as to present not even token compliance with the provisions of Rule 9(b) which require a pleader averring fraud to state 'with particularity' the circumstances alleged to constitute fraud." (Opinion, page 2)

Rule 9(b), reads as follows:

> "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."

That this Court of Appeals is factually erroneous and incorrect is disclosed by the Petition itself. Woodmar's amended petition covers forty-six (46) printed pages of the appendix printed and filed in accordance with Rule 10(b) of the Court of Appeals. (Original appendix, pages 39-85, inclusive). It incorporates, by reference, a Bill of Particulars one hundred (100) printed pages in length. (Original appendix, pages 86 thru 185, incl.) One hundred and three (103) documentary exhibits are referred to in the Amended Removal Petition, many of which are over 10 pages in length. These exhibits are summarized in the Bill of Particulars, with an appropriate index. Copies of each of

the exhibits were served on the Trustee and his counsel and the District Judge prior to the date originally set for a hearing on the merits, to-wit: July 30, 1958.

Even if the opinion of the Court of Appeals was accurate and correct in its characterization of the allegations of the Amended Petition (which it is not), *dismissal of the pleading without a hearing on the merits is a drastic penalty not authorized by the Federal Rules of Civil Procedure* or the case law on the subject:

> "* * * Dismissal with prejudice is a *drastic sanction* to be applied only in *extreme* situations. *Gill* v. *Stalow*, 2 Cir., 1957, 240 F. 2d 669; *Producers Releasing Corp. de Cuba* v. *PRC Pictures*, 2 Cir., 1949, 176 F. 2d 93, and here the preclusion order seems an ample penalty for any lack of cooperation on plaintiff's part.
>
> We hold that *dismissal was improper.*" (Our emphasis).
>
> *Syracuse Broadcasting Corporation* v. *Newhouse*, CCA 2 1959, 271 F. 2d 910, 914.

> "* * * These decisions establish that there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to *dismiss* an action *without affording a party the opportunity* for a hearing on the merits of his cause. * * *" (Our emphasis).
>
> *Societe International etc.* v. *Rogers* (1958), 357 U. S. 197, 209, 78 S. Ct. 1087, 1094.

That *the opinion establishes a new and erroneous precedent*, predicated upon a misconstruction of the language, meaning, and purpose of said Rule 9(b) is apparent.

This opinion conflicts with the construction of said Rule 9(b) to the effect that failure to particularize general allegations is not ground for dismissal which has been uniformly held in other circuits.

Kohler v. *Jacobs* (CCA 5, 1943), 138 F. 2d 440, 443;

Levenson v. *B. & M. Furniture Co.* (CCA 2, 1941), 120 F. 2d 1009;

Lynn v. *Valentine*, (S.D. N.Y. 1956), 19 F.R.D. 250, 254;

United States v. *Atlantic Basin Iron Works* (D.C. E.D. N.Y. 1943), 53 F. Supp. 268, 270;

Perrott v. *United States* (D.C. Del. 1944), 53 F. Supp. 953, 957;

Union Mutual Life Ins. Co. v. *Simon*, (D.C. E.D. Pa. 1958), 22 F.R.D. 186.

The unusual feature of the present case is that respondents, whose duty it was to meet the charges, did not raise any question about conformity with Rule 9(b) in the District Court. The District Judge, sua sponte, ordered the removal petition particularized. Although your petitioner had complied fully with the order of July 30, 1938, and over two years and 2 months later, the District Court still dismissed the Amended Petition, on his own initiative, because it allegedly, didn't comply with the one sentence directive of Rule 9(b), supra.

V.

The opinion of the Court of Appeals, on its face, has undertaken to deviate from well-accepted Appellate procedure in a new and erroneous misapplication of the judicial notice doctrine as an attempted substitute for a hearing on the merits.

It will be observed that, as an excuse for precluding your petitioner from having a hearing on the merits, the Court of Appeals has undertaken *to decide* that the allegations of the Amended Petition *are untrue*:

"Counsel first contends that we must pretend that the record facts laboriously compiled in the records and files of the court below in more than 20 years of proceedings do not exist and that we may not on this appeal take judicial notice of such facts. It is elementary that the Court below is bound to take judicial notice of its records and files in this cause and that **it is our duty to take notice of facts which have come to our knowledge through the record presented to us on the several appeals in the same case.**"

(Opinion, page 6)

• • • • • •

"However absurd the above contention, it is yet only the minor premise employed to support a hypothesis that appellee's motion to dismiss appellant's amended petition must be construed as admitting all facts alleged, even though such alleged facts are shown by the record of the case to be untrue. That hypothesis is too tenuous to require any comment." (Opinion, page 6)

• • • • •

"Since we must take judicial notice of the fact, whenever it be a fact, that the allegations of appellant's amended petition are refuted by the record, we accordingly determine the sufficiency of the allegations of the amended petition in the light of the record of the case, as it is known to us." (Opinion, page 6)

The District Court, however, in its opinion of October 21, 1960, (Appellant's Appendix in Court of Appeals No. 13215, pages 248-284, inclusive) not only did not apply any judicial notice doctrine, but did not undertake to assert that any allegation in the Amended Petition was either untrue or in conflict with record facts before it. Rather, as an erroneous ground for dismissal, the District Court stated:

"(3) The matters raised in the Amended Petition are res judicata and, etc."

After the case had been fully briefed on appeal, it became apparent that the District Court had erred in its opinion in basing the dismissal on the ground of "res judicata". Respondent trustee, Walter A. McLean, had not yet been appointed trustee on December 3, 1952, when the alleged adjudication occurred. Furthermore, the findings and opinion of the District Court, upon which the December 3, 1952 order was predicated, expressly found that your petitioner had not made any charge of fraud against respondent Herschel B. Davis in resisting his application for fees:

> "**Except as to Herschel B. Davis**, * * * the claimants are separately charged with the perpetration of frauds upon the court, the debtor, and its stockholders as grounds for the denial of their claims".
>
> (Certified copy of Supplemental Transcript of Record in Cause No. 11783, page 21).

In addition, your petitioner, the debtor corporation, prevailed generally in its objections to the fiduciaries' fee claims, its 1951 removal petitions, and its objections to the fraudulent proposed amendment to the reorganization plan. As a matter of law, your petitioner was precluded from taking an appeal from the findings and opinion of October 29, 1952, and the order of December 3, 1952, because the decision was in favor of the Woodmar Realty Company.

The Court of Appeals, not your petitioner, introduced the "judicial notice" doctrine for the first time in the opinion of June 23, 1961, sought to be reviewed. That your petitioner did not make any contention with regard to the judicial notice doctrine until it filed its Petition for Rehearing can be ascertained from an inspection of the record in the case. (See also Rehearing Petition, pages 44-54, inclusive.) The record on the appeal to the Seventh Circuit Court of Appeals was prepared, printed, and filed in con-

pliance with Rule 16(b) of that Court. To avoid any unnecessary printing costs, the use of the printed record and supplemental record in cause No. 17783, the first appeal, as a partial appendix was authorized. There are no facts in these printed records, or any printed records, which dispute or conflict with the factual allegations of the Amended Petition or establish a single one of them to be untrue as the Court of Appeals opinion incorrectly asserts.

If the printed appendices and record in No. 17783 do not disclose any facts to refute the truth of the allegations of the Amended Removal petition, and the District Court did not either apply the judicial notice doctrine or find any facts in the Amended Petition untrue, where are the facts which the Court of Appeals allegedly takes judicial notice of? The answer is that they are non-existent.

Furthermore, a Court of Appeals cannot be the trier of facts. That function is exclusively the function of a nisi prius court. The record which the Court of Appeals acts upon is the printed record, or appendices, printed and filed in accordance with its rules. The doctrine of judicial notice of other records is limited to an examination of the records in earlier appeals to decide: (1) What the issues raised previously were, (2) What was decided in the former appeal, and (3) to what extent did the earlier decision or decisions establish the law of the case insofar as its binding affect on the parties and the District Court in further proceedings are concerned.

The limitations on the doctrine of judicial notice in a court of review are well expressed in the following Indiana cases:

"To *ascertain* what facts were *before* the Supreme *Court* on the former appeal, and to what extent the decision there

made is the law of the case, we *may* look to the record in that case." (Our emphasis)

Automobile Underwriters, Inc. v. *Rich* (1946), 116 Ind. App. 511, 515, 64 N.E. 2d 305;

Catherwood v. *Morgan, Admr.* (1934), 99 Ind. App. 332, 333, 188 N.E. 801.

"This court may *look* into the record (of the former appeal), for the *purpose* of *ascertaining* what facts were *before* it on the former appeal, and to what extent the rule applies that the decision there made is the *law of the case.*" (Our emphasis)

Westfall v. *Wait* (1905), 165 Ind. 353, 359, 73 N.E. 1089.

State, ex rel v. *Board* (1906), 166 Ind. 162, 76 N.E. 986 is to the same effect, plus the fact that there the plaintiff-appellant *pleaded* the Supreme Court's former opinion as an *adjudication.* (pp. 169-170).

The Court said:

> "It will not admit of doubt that in a case of this kind, where the very opinion and judgment of this Court is *pleaded* as an adjudication, we are at liberty to *look* to the entire record for the *purpose* of determining *what was adjudicated.*" (Our emphasis)

Again, as stated in the case of *Oklahoma City Electric Gas & Power Co.* v. *Baumhöff* (1908), 21 Okla. 503, 96 Pac. 759, at page 760:

> "The records on a former appeal in the same action may be looked into for the purpose of ascertaining what facts and questions were then before the court, so as to see to the correct application of this rule that such decision is the law of the case. *McKinlay* v. *Tuttle*, 42 Cal. 571."
>
> "Any other rule would introduce great uncertainty in the proceedings of courts, and produce the incon-

venience' that it was the object of the Constitution of this state to guard against."

The unwarranted application of the judicial notice doctrine in the present case, as a substitute for a hearing on the merits, is more harmful in its result than might ordinarily occur because, contrary to prior custom, none of the judges of the Court of Appeals who sat on the two panels in the earlier appeals, 241 F. 2d 768 and 284 F. 2d 815, participated in the decision sought to be reviewed. The present opinion was issued by a District Judge, Honorable Frederick O. Mercer, of Peoria, Illinois, who was called up to participate in the determination of the appeal. This may be a partial explanation for the unwarranted and novel application of the judicial notice doctrine by the Court of Appeals.

VI.

The Court of Appeals has violated established precedent by affirming a dismissal of petitioner's Amended Removal Petition because of claimed "bad faith" and "near contemptuous" conduct on the part of one of its three attorneys, Mr. Crumpacker.

The Court of Appeals has sanctioned and participated in the castigation and criticism of one of your petitioner's attorneys, Mr. Crumpacker, as grounds for dismissing its pleading without a hearing on the merits:

"This opinion might rest there and the judgment be affirmed without further discussion were it not for the pervading impressions gathered from the record that the removal petition constitutes an attempt by appellant's attorney, Mr. Crumpacker, to harass appellees in the continued performance of their official functions and a near contemptuous abuse of the processes of a federal court." (Opinion, page 2)

* * * * *

"* * * We think it necessary to document the evident fact of gross bad faith which characterizes these allegations." (Opinion, page 2)

* * * * *

"From the foregoing summary of some pertinent parts of the record facts in this cause emerges a pattern of conduct which has characterized the actions of counsel for appellant for some ten years." (Opinion, page 13)

* * * * *

"We approve the concluding paragraph of Judge Tehan's opinion, as follows, as a summary of the record in that respect:

> "My own personal experience convinces me that there exists a complete lack of good faith.' " (Opinion, page 17)

"Because we are convinced that the record in this case presents a contemptible, if not a contemptuous abuse of the legal processes of a federal court, we have dwelt at length on the historical resumé of the record facts as they have come to our attention." (Opinion, page 17)

"We find a sordid picture of the repeated use of ill-founded charges of fraud as a trial tactic which is foreign to established concepts of honest and ethical advocacy. We want it clearly understood that repetition of that practice as disclosed by this record will not be tolerated in the future." (Opinion, page 18)

The record conclusively shows that the Removal Petition was filed in utmost good faith, the severe, libelous, and unjustified criticism of one of petitioner's attorneys notwithstanding. The petition was prepared, served, signed, and filed on May 19, 1958, pursuant to the direction of District Judge Tehan at a conference in Milwaukee held on

April 24, 1958. (Appellant's Appendix in No. 13215, pages 23-30, incl.) The petition was amended, admittedly, on order of District Judge Tehan on July 30, 1958. The motion to dismiss did not question the good faith of petitioner's counsel. Likewise, during the argument on the motion to dismiss on May 21, 1959, not a word was mentioned by counsel or the District Judge on the subject of "bad faith" or the propriety of Mr. Crumpacker's activity in the preparation, filing, and participation in the argument on the respondents' motion to dismiss the Amended Removal Petition.

Significantly, three attorneys, Benjamin Wham, Owen W. Crumpacker, and George V. Burbach, participated equally in preparing, signing, and presenting the Removal Petition and the Amended Removal Petition. They participated equally in preparing and filing the briefs and record on appeal. The Amended Petition was sworn to by Helen Woods, the President of the petitioning company. All three of petitioner's attorneys were members in good standing of the Bars of the District Court and the Court of Appeals. Two of them, Benjamin Wham and Owen W. Crumpacker, are long standing members of the Bar of the Supreme Court of the United States. Yet, only one of them is singled out for abuse, defamation, and libel.

The Court of Appeals, without any issues having been formed on the subject, or notice of or opportunity to be heard, has undertaken to print and publish an opinion which devotes itself to a studied effort to impugn the honesty and integrity of one of the attorneys, Owen W. Crumpacker, as ground and reason for an unprecedented affirmance of a dismissal of the Amended Removal Petition without a hearing on the merits.

Mr. Crumpacker has represented the Woodmar Realty Company in the proceedings during the entire 21-year period. The participation of Mr. Wham and Mr. Burbach dates back to the summer of 1956.

Even if Mr. Crumpacker had been guilty of the misconduct and bad faith attributed to him, it would not be ground for dismissing your petitioner's Amended Removal Petition without a hearing on the merits. To do so was a denial of due process not authorized by the practice. *Hoeen v. Elliott* (1896), 167 U.S. 490, 42 L. Ed. 2, 17 Sup. Ct. 841; *Societe International Etc. v. Rogers* (1958), 357 U.S. 197, 209, 210, 78 S. Ct. 1087, 1094.

Furthermore, the libel and abuse of a lawyer for acting in good faith in the performance of his duties to the court and client is not permitted by law. *Sacher v. United States* (1952), 343 U.S. 1, page 13, 72 S. Ct. 451, page 457 correctly states the rule as follows:

> "Summary punishment always, and rightly, is regarded with disfavor and, if imposed in passion or pettiness, brings discredit to a court as certainly as the conduct it penalizes."
>
> * * *
>
> "Of course, it is the right of counsel for every litigant to press his claim, even if it appears farfetched and untenable, to obtain the court's considered ruling. Full enjoyment of that right, with due allowance for the heat of controversy, will be protected by appellate courts when infringed by trial courts."
>
> * * *
>
> "That contempt power over counsel, summary or otherwise, is capable of abuse is certain. Men who make their way to the bench sometimes exhibit vanity, irascibility, narrowness, arrogance, and other weaknesses to which human flesh is heir. **Most judges, however, recognize and respect courageous, forthright**

lawyerly conduct. They rarely mistake overzeal or heated words of a man fired with a desire to win, for the contemptuous conduct which defies rulings and deserves punishment. They recognize that our profession necessarily is a contentious one and they respect the lawyer who makes a strenuous effort for his client."

Your petitioner, unsuccessfully, requested that the Court of Appeals correct its opinion in accordance with the procedure set out in the case of *Nadeau* v. *Texas Company, et al.* (1937), ... Mont. ....., 69 Pac. 2d 593, 111 A.L.R. 875. It filed a separate motion to strike and expunge which has been certified up by the Clerk of the Court of Appeals as part of the record. It, likewise, unsuccessfully sought relief in the Petition for Rehearing, copies of which have also been filed as part of the record in the Supreme Court. The deliberate defamation and libel of a member of the Bar in an unprecedented case involving the public interest in the administration of justice should not be permitted to go unnoticed or unremedied.

Wherefore, Petitioner respectfully prays that this Court may issue its Writ of Certiorari to bring up and review this case, whereupon the judgments below may be reversed, and for all other proper relief.

Respectfully submitted,

BENJAMIN WHAM,
OWEN W. CRUMPACKER,
GEORGE V. BURBACH,

Attorneys for Petitioner.

APPENDIX.

APPENDIX.

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago 10, Illinois

Monday, October 2, 1961

Before

Hon. Win G. Knoch, Circuit Judge
Hon. Latham Castle, Circuit Judge
Hon. Frederick O. Mercer, District Judge

In the Matter of the Woodmar Realty Company, a Corporation, Debtor.

Woodmar Realty Company, a Corporation, Appellant,

No. 13215 vs.

Walter A. McLean, Trustee and Herschel B. Davis, Trustee's Attorney, Appellees.

Appeal from the District Court for the Northern District of Indiana, Hammond Division.

ORDER.

It is hereby ordered that our opinion in the above-entitled appeal be and the same hereby is amended in the following particulars:

The following paragraph appearing on page 12 of the slip opinion is deleted, to-wit:

"The latter motion was stricken on March 20, 1956, and though the appeal was taken from the order of March 5, 1956, the March 20th order was not appealed."

The following paragraph is inserted at page 12 in lieu of the paragraph thus deleted, to-wit:

(Appendix)

"The latter motion was stricken on March 20, 1956, and though the appeal was taken from the order of March 5, 1956; it appears from our opinion in *In re Woodmar Realty Company*, 7 Cir., 241 F. 2d 768, that the March 20th order striking appellant's motion to vacate the 1941 order and the 1952 findings and conclusions was not then presented to this Court for review."

The following language, beginning at the ninth line from the bottom of page 12 of the slip opinion and continuing at the top of page 13, is deleted, to-wit:

"On the contrary, the court expressed the opinion that the evidence failed to disclose that any prejudice resulted from the misconduct then disclosed, and the record indicates that appellant and its counsel were then in accord with that conclusion. First, in colloquy during the proceedings upon the removal of Surprise, counsel for appellant told Judge Swygert that there were no prior orders of court which he felt should be vacated as a result of the disclosure of facts which then came to light. Secondly, no appeal was taken from the judgment following the Surprise hearing. Thirdly, in February, 1953, appellant, through its counsel, consented to the adjudication of appellant's bankruptcy."

The following language is inserted in lieu of the language thus deleted, as the concluding sentences of the paragraph from which the above-quoted language is deleted:

"On the contrary, the court expressed the opinion that the evidence failed to show that any prejudice resulted from the misconduct then disclosed. The record indicates that appellant and its counsel were then in accord with that conclusion, inasmuch as no appeal was taken from the 1952

decision, and thereafter, appellant, through its counsel, consented to the adjudication of appellant's bankruptcy and to continuation of the cause in bankruptcy pursuant to Section 236(2)."

The following paragraph beginning on line 5 of page 13 of the opinion is deleted, to-wit:

"Despite that apparent accord, counsel has advanced the same charges of fraud in 1956 and 1957, and again in 1958 and 1959 by the petition under review."

The following paragraph is inserted in lieu of the paragraph thus deleted:

"Notwithstanding that apparent accord, counsel has advanced the same charges of fraud in 1956 and 1957. Thereafter, on May 19, 1958, counsel for appellant stated in a pre-trial conference that there were no prior orders of court which he felt should be vacated because of elements of fraud alleged to affect the cause. Contemporaneously with that statement, the fraud charges were renewed by the 1958 petition which, as amended in 1959, is now before the court for review."

The Clerk is directed to amend the slip opinion in accordance with this order prior to publication of the opinion in the Federal Reporter.

(Appendix)

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago 10, Illinois

Monday, October 2, 1961

Before

Hon. Win G. Knoch, Circuit Judge
Hon. Latham Castle, Circuit Judge
Hon. Frederick O. Mercer, District Judge

In the Matter of the Woodmar Realty Company, a Corporation, Debtor.

Woodmar Realty Company, a Corporation, Appellant,

No. 13215 vs.

Walter A. McLean, Trustee and Herschel B. Davis, Trustee's Attorney, Appellees.

Appeal from the District Court for the Northern District of Indiana, Hammond Division.

ORDER ON PETITION FOR REHEARING.

Appellant has filed for our consideration, a petition for rehearing, a motion to strike and expunge portions of the court's opinion dated June 23, 1961, a motion for leave to file a reply to appellees' answer to appellant's motion to expunge portions of the opinion and a motion for oral argument upon the petition for rehearing.

The motion for leave to file a reply to appellees' answer to the motion to expunge is allowed.

The motion for oral argument is denied.

In its petition for rehearing and motion to expunge, appellant asserts that we presumed by our opinion of June 23, 1961, to decide issues respecting the validity of claims

and other matters yet pending for decision by the court below. We think our opinion clearly shows that that is not the case, but that we merely alluded to the facts that the trustee's report is now pending before the trial court and that the memorandum opinion of the trial judge upon appellant's objections to Claim 441 expressed the judge's opinion that appellant's objections to claims were not well taken. Allusion to those facts was unavoidable, inasmuch as appellant alleged in the petition under review that the trustee's report and recommendations were the products of fraud as shown by the fact that the trustee had, among other things, failed to raise those self-same objections to the lien claims.

In order that there may be no doubt about it, we reiterate that we have expressed no opinion as to the merit of the trustee's report, the merit of appellant's objections to claims, the validity, or amount, of any lien claim, or any other matter yet pending in the court below.

With the foregoing observation, the petition for rehearing and appellant's motion to expunge parts of our opinion are hereby denied.

(Appendix)

In The
UNITED STATES COURT OF APPEALS
For The Seventh Circuit

September Term, 1960 April Session, 1961

No. 13215

In the Matter of the Woodmar Realty Company, a Corporation, Debtor.

Woodmar Realty Company, a Corporation, Appellant,

vs.

Walter A. McLean, Trustee and Herschel B. Davis, Trustee's Attorney, Appellees.

On Appeal from the District Court for the Northern District of Indiana, Hammond Division.

June 23, 1961

Before Knoch and Castle, *Circuit Judges*, and Mercer, *District Judge*.

Mercer, *District Judge*. The only issue before us for decision upon this appeal by the bankrupt, Woodmar Realty Company, is whether the court below properly dismissed Woodmar's amended petition for the removal of the appellees, Walter A. McLean and Herschel B. Davis, as trustee in bankruptcy and attorney for the trustee, respectively. For convenience, the parties are hereinafter sometimes referred to as appellant and appellees.

Appellant's amended petition, filed January 7, 1959, charged that appellees had perpetrated, and were perpetrating a fraud upon the court and Woodmar and requested

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that appellees be removed by the court as trustee in bankruptcy and as counsel, respectively. Appellees moved to dismiss. After a hearing, the court granted that motion upon its conclusion that "the amended petition is so wanting in merit and so contemptuously violative of the rules of pleading, particularly Rules 8 and 9 of the Federal Rules of Civil Procedure" that it might be summarily dismissed and upon his finding that the amended petition was not filed in good faith.

We have reviewed the record and the amended petition carefully and are convinced that the petition is so wanting in sufficient allegations of fact as to present no even token compliance with the provisions of Rule 9(b) which require a pleader averring fraud to state "with particularity" the circumstances alleged to constitute fraud. F.R.C.P. 9(b), 28 U.S.C.A. This opinion might rest there and the judgment be affirmed without further discussion, were it not for the pervading impressions gathered from this record that the removal petition constitutes an attempt by appellant's attorney, Mr. Crumpacker, to harass appellees in the continued performance of their official functions and a near-contemptuous abuse of the processes of a federal court.

For the above reason we think it necessary to analyze the amended petition at some length in the light of the record as it has come to our knowledge. In that endeavor, we rely upon the procedural history of this case as summarized in the opinions upon prior appeals. *In re Woodmar Realty Co.*, 7 Cir. 284 F. 2d 815; *In re Woodmar Realty Co.*, 7 Cir., 241 F. 2d 768. Basically, we hereinafter supplement those summaries, but we have not hesitated to resort to repetition thereof to the extent deemed necessary

to demonstrate the propriety of our conclusions which are hereinabove and hereinafter expressed.

The inception of this cause lies in the depression which struck the nation with tornadic force in 1929. In the 1920's, appellant, a corporation, was engaged in the business of subdividing and selling real estate in the City of Hammond, Indiana. Substantial improvement touching the various parcels of appellant's lands were made by the City of Hammond and financed by special assessment bonds issued and sold pursuant to the so-called Barrett Law.

By separate lot and parcel, appellant's real estate was impressed with the liens of Barrett Bonds issued on some sixty separate bond rolls. In each instance, appellant in consideration of the privilege of paying the assessment's obligation in installments spread over a period of years, executed a statutory waiver of the right to question the legality of assessment and agreement to pay installments as the same became due.

It appears that appellant had been a completely inactive corporation for many years prior to January, 1941, when this cause was commenced. No payments had been made by it on account of the principal and interest of Barrett bond obligations after 1929. Suits had then been commenced in state courts for the foreclosure of Barrett bonds issued upon some fifty rolls affecting appellant's real estate and, as the court below has found, sale of much of the land in foreclosure was imminent.

Against that background, this proceeding was commenced on January 13, 1941, when an involuntary petition was filed on behalf of three bondholders for reorganization of appellant under Chapter X of the Bankruptcy Act, 11 U.S.C.A. 501, *et seq.* Appellant's only assets were

substantial real estate located in Hammond, which was then encumbered by a lien for state taxes in the sum of $161,000.00, by the lien of mortgage bonds in an aggregate sum in excess of $290,000.00, and by the defaulted Barrett bonds which were, respectively, liens upon separate lots, tracts and parcels of the total real estate holdings. In addition, appellant was then indebted to general creditors in the aggregate sum of approximately $14,000.00.

A proposed plan of reorganization was approved by Judge Slick. Barrett bond claims were classified as Class 2 claims. With court approval, the tax claim and mortgage claims were compromised and settled for a nominal percentage of the respective amounts thereof. Appellant's real estate was sold free of all liens under court orders providing that all liens would attach to the proceeds of the sales in the hands of the trustee. Such sales continued until early 1951, and were approved by the court upon some fifty separate petitions reporting sales as they were made from time to time.

Also, when the reorganization petition was approved on January 25, 1941, an injunction was issued by the court enjoining creditors and all other persons from enforcing liens against appellant's property, and from prosecuting, or continuing the prosecution of, any suit against appellant in any court for the foreclosure of liens against its property. Pursuant to that injunction, the pending foreclosure suits were dismissed insofar as they related to appellant's real estate.

On December 22, 1952, appellee McLean was appointed successor trustee as a result of circumstances hereinafter related and appellee Davis was retained as attorney for the trustee. Thereafter, on February 16, 1953, after notice

and a hearing, Judge Swygert entered an order converting the proceedings into a straight bankruptcy, and ordered that bankruptcy be proceeded with pursuant to Section 236(2) of the Bankruptcy Act, 11 U.S.C.A. 636(2).

On September 7, 1955, appellee McLean filed his final report as trustee and petitions recommending the allowance of more than 300 class 2 lien claims. By that report, he proposed that substantially all of the funds in his hands be allocated to the payment of those claims. Thereafter, appellant and some of its stockholders filed objections to a substantial number of the class 2 claims. On March 5, 1956, after a hearing upon motions filed by the trustee and a number of the class 2 claimants, Judge Swygert entered an order striking appellant's objections. An appeal was taken and we reversed that judgment, holding that appellant, though adjudicated a bankrupt, had standing to object to claims because of the circumstance that disallowance of class 2 claims might result in a surplus of assets for refund to appellant. *In re Woodmar Realty Co.*, 7 Cir., 241 F. 2d 768.

Before our mandate was filed, Judge Swygert disqualified himself to preside further in the cause because of circumstances which are hereinafter related and the cause was assigned to Judge Parkinson.

Upon the return of our mandate, Judge Parkinson scheduled a pre-trial conference upon all claims and objections thereto. On the day preceding that conference, June 27, 1957, appellant filed a petition for removal of appellees as trustee and as counsel for the trustee. At the pre-trial conference on June 28, Judge Parkinson determined that he would schedule a trial of a representative claim to establish the law of the case with respect to

all of appellant's objections. Claim No. 441 was selected for that purpose. At the same time, an order, which we believe to be patently erroneous, was entered directing the trustee and his attorney not to participate in the trial of objections to that claim.(1) Other class 2 claimants were, however, invited to participate. On the same date, a hearing upon appellant's petition for removal of appellees was set for July 17, 1957.

A trial of objections upon claim 441 was held on July 15, 1957, and briefs were ordered. On July 17, the date set for a hearing upon the removal petition, that petition was withdrawn by appellant.

Thereafter, while the issues presented upon the trial of objections were still under advisement, Judge Parkinson was elevated to this court and the case was assigned to his successor, Judge Grant. Judge Grant disqualified himself for personal reasons, and the case was reassigned by Judge Duffy, then Chief Judge of the Seventh Circuit, to Judge Tehan. By stipulation of interested parties, the issues upon the trial of objections were taken by Judge Tehan for decision upon the record made before Judge Parkinson.

In the meantime, on May 19, 1958, counsel for appellant filed a petition for removal of appellees which was almost an exact duplicate of the petition which had been with

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(1) That order was not appealed, and the propriety thereof was not an issue in the second appeal in which we approved settlement agreements disposing of a number of the pending class 2 claims. However, in his dissenting opinion, Judge Duffy did indicate his disapproval of the order. *In re Woodmere Realty Co.*, 7 Cir., 284 F. 2d 815, 821, 822.

drawn by him on July 17, 1957. The petition was answered and set for a hearing. On the date set for that hearing, Judge Tehan, on his own motion, ordered appellant to replead to comply with the requirements of Rule 9(b). Appellant's amended petition was then filed on January 7, 1959.

The amended petition is characterized by a gross lack of any sufficient allegation of fraud as we have herein above concluded. In fact, counsel can given arguable credence to this appeal and arguable merit to the amended petition only by asserting supposed legal principles which are so grossly absurd that we cannot believe they are here honestly asserted. In the interest of smooth rhetorical transition all of such contentions are not here particularized, but they are subsequently discussed briefly in proper context.

Counsel first contends that we must pretend that the record facts laboriously compiled in the records and files of the court below in more than twenty years of proceedings do not exist and that we may not on this appeal take judicial notice of such facts. It is elementary that the court below was duty bound to take judicial notice of its records and files in this cause and that it is our duty to take notice of facts which have come to our knowledge through the records presented to us on the several appeals in this same case. *Paridy* v. *Caterpillar Tractor Co.*, 7 Cir., 48 F. 2d 166, 168; *Littleton* v. *DeLashmutt*, 4 Cir., 188 F. 2d 973; *Fletcher* v. *Bryan*, 4 Cir., 175 F. 2d 716; *In re Davis Mfg. Co.*, D. Kan., 95 F. Supp. 200, 203. However absurd the above contention, it is yet only the minor premise employed to support a hypothesis that appellee's motion to dismiss appellant's amended petition

must be construed as admitting all facts alleged, even though such alleged facts are shown by the record of the case to be untrue. That hypothesis is too tenuous to require any comment. See E. G., *Interstate Natural Gas Co.* v. *Southern California Gas Co.*, 9 Cir. 209 F. 2d 380, 384; *Fletcher* v. *Jones*, D. C. Cir., 105 F. 2d 58, 61. Since we must take judicial notice of the fact, whenever it be the fact, that the allegations of appellant's amended petition are refuted by the record, we accordingly determine the sufficiency of the allegations of the amended petition in the light of the record of the case as it is known to us.

Both the original petition and the amended petition are summarized in some detail in Judge Tehan's opinion filed October 21, 1960. We adopt that summary as our own, and here employ only such narrative description of the charges of the amended petition as is consistent with an intelligible discussion of the allegations thereof in the light of the record.

If the amended petition has any factual basis whatsoever, it tends to state a charge not against appellees, but only a renewal of charges made at least as early as November, 1952, against the prior trustee, Charles L. Surprise, and other persons. Thus it is alleged that Surprise, and others, conspired to perpetrate a fraud upon the Court and appellant in order to obtain the initial finding of appellant's insolvency, to have themselves appointed as fiduciaries having control of appellant's property and thereafter to dispose of and distribute appellant's property to class 2 claimants to their own benefit and profit.

The amended petition contains not a single allegation connecting either of the appellees with the alleged conspiracy and fraudulent conduct of those persons, except

for the record fact that appellee Davis was appointed by the court as co-counsel for Surprise in May, 1950 and served Surprise in that capacity until hearings were commenced in 1951, which ultimately led to the removal of Surprise as trustee. Upon that record fact hangs the tenuous allegation that Mr. Davis became tainted by the alleged fraud of Surprise through that representation and that appellee McLean became likewise tainted through his association with Mr. Davis after Mr. McLean was appointed successor trustee.

In his opinion dismissing the amended petition, Judge Tehan correctly and accurately concluded that such allegations were an "obvious attempt to establish guilt by association", and that the allegations were refuted by facts found and adjudicated in this case. We approve those conclusions without reservation, and resort to the resumé of the procedural history of the case which follows only because we think it necessary to document the evident fact of gross bad faith which characterizes these allegations.

When Judge Slick granted the involuntary petition for reorganization of appellant, Surprise was appointed trustee in the reorganization and Carl A. Huebner was appointed as attorney for the trustee. Thereafter, a plan of reorganization was approved by the court and a bondholders committee consisting of owners of special improvement bonds and attorneys for such owners was appointed.

The record made during the first ten years of this proceeding discloses no participation by appellant in the cause after January 25, 1941, when the involuntary petition for reorganization was approved. Appellant's par-

ticipation on the latter date consisted of the filing of an answer, in which all allegations of the reorganization petition were admitted, including the allegation of appellant's insolvency. During that ten year period, as previously related, the foreclosure suits affecting appellant's property were dismissed pursuant to the injunction issued by Judge Slick, the tax liens and mortgage liens were compromised and settled and appellant's real estate was sold with court approval, free of the liens of the Barrett Law bonds. The record discloses no objection by appellants at any stage of those proceedings, including the real estate sales.

In the meantime, in 1950, Carl Huebner was convicted in an Indiana court of criminal conduct in conjunction with the foreclosure of Barrett Law bonds. Judge Swygert, who was then presiding in the case, effected Huebner's removal as attorney for Surprise and on May 23, 1950, appointed the appellee and Arnold Huebner, Carl's brother, as co-counsel for the trustee.

An amendment to the plan of reorganization was filed in the early part of 1951, and set for hearing at a meeting of interested persons to be held on April 16, 1951. Also pending at that time were petitions filed by Surprise, Carl Huebner, Arnold Huebner, Mr. Davis, members of the bondholders committee and attorneys for the bondholders committee for the allowance of fees.

On the latter date, appellant filed a petition for the removal of Surprise as trustee, alleging that neither he nor the Huebners were disinterested persons for the reason that Surprise and Carl Huebner were principal owners of Lake Assessment Bonds Services, Inc., a holder and collection agent for a number of the special improvement bonds which were a lien upon appellant's real estate.

It was also alleged that S. C. Ennis & Company, selected by Surprise as agent for sale of the real estate, had sold a large part of appellant's real estate to a corporation owned by itself.

At the same time, appellant filed objections to the fee petitions of Surprise and both Huebners upon the ground that each owned or represented interests which were adverse to those of both the creditors and stockholders of appellant. Objection was made to the fee petitions of members of the bondholders committee and their attorneys upon the ground that they had employed their positions to effect the purchase of outstanding bonds which were a lien upon appellant's real estate during their tenure as court-appointed fiduciaries.

Appellant's objection to Mr. Davis' petition for fees was predicated upon the alleged fact that Mr. Davis had represented a disqualified Trustee and had, in that representation, worked in collaboration with a disqualified co-counsel, Arnold Huebner, and a disqualified bondholders committee. It was also alleged that Mr. Davis had been remiss in his failure to discover and report to the court the activities and conflicting relationships of Surprise and other fiduciaries.

One other petition by appellant, namely a petition requesting the court to find that appellant was not insolvent, was before the court with the petition for removal of Surprise and appellant's objections to the fee petitions.

After extensive hearings had been held in 1951 and 1952 Judge Swygert entered a memorandum order on October 29, 1952, disposing of the above pending petitions and objections. The court found that Surprise and Carl Hueb-

ner, as substantial owners of Lake Assessment, held an interest which was materially adverse to the creditors and stockholders of appellant, and concluded that those persons would not have been appointed as trustee and trustee's attorney had that adverse interest been known to the court. The court found, further, that certain sales of real estate by Ennis had not been made at arm's length and that several of the persons acting in a fiduciary capacity in the estate had used their appointment to profit from speculation in Barrett bonds which were liens upon appellant's property. The court concluded, however, that no prejudice to creditors or the stockholders of appellant was revealed by the evidence.(c)

(c) The methods and practice employed by Huebner and others who were connected with the early proceedings in this case in the State court litigation involving Barrett bonds are documented in part in the following cases. *In re Huebner*, 233 Ind. 363, 118 N.E. 2d 898; *In re Harrison*, 231 Ind. 665, 109 N.E. 2d 912; *Harrison v. State*, 231 Ind. 147, 106 N.E. 2d 912; *Gardner v. State*, 229 Ind. 368, 97 N.E. 2d 921; *Gilkison v. Darlington*, 123 Ind. App. 28, 106 N.E. 2d 473. From those cases it appears that fraud did affect the foreclosure proceedings upon some rolls of bonds issued under the Barrett Law.

In this case, it is a documented fact that extensive hearings were held relative to the activities of Surprise, Huebner and others, after which the court determined that their actions had been in some respects improper, but that those actions had not detrimentally affected appellant's estate and the administration thereof. It is apparent from Judge Swygert's opinion entered October 29, 1952, that he was convinced that no fraud had entered into the early stages of proceedings in the case. Since no appeal was taken from the order entered following that opinion it reasonably appears that appellant's counsel was also convinced that the proceedings had not been affected by fraud.

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An order was then entered removing Surprise as trustee, disbanding the bondholders committee, denying the fee petitions of Surprise, the Huebners and certain other of the fiduciaries and directing that statutory notice be given of a hearing to convert the cause to a straight bankruptcy pursuant to Section 2362).

The fee petition of Mr. Davis and those of certain of the members of the bondholders committee were allowed. In allowing the Davis fee petition, the court found that there was no evidence that Mr. Davis had knowledge of the improper interest and conduct of Surprise and the other fiduciaries or that appellant's attorney had ever called those facts to his attention prior to the hearing upon the petition to remove Surprise.

Finally, by the same opinion, Judge Swygert rejected appellant's petition for a decree of its solvency, holding that appellant was bound by the admission of insolvency made in its answer filed in 1941.

On November 7, 1952, appellant and some of its stockholders filed a motion for a new trial and for amendment of the findings of fact entered October 29, 1952, alleging, in part, as follows: a. That the court had erred in allowing compensation to certain members of the bondholders committee in view of the alleged proof that they had conspired with Surprise and his attorneys to perpetrate a fraud upon the court and upon appellant; and b. That the court had erred in failing to find that the original reorganization petition had been a part of a conspiracy to perpetrate a fraud upon the court and appellant to obtain a decree of insolvency and to gain control of appellant's assets.

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No error was alleged with respect to the allowance of fees to Mr. Davis. That motion was denied on February 10, 1953, and no appeal was taken.

In the meantime, on December 3, 1952, one Samuel H. Cohn was appointed successor trustee. Mr. Cohn died within two weeks thereafter and the appellee, McLean, was appointed successor trustee on December 22, 1952. Appellee, Davis, was retained by the court as attorney for the trustee.

On February 16, 1953, after notice and a hearing, appellant was adjudicated a bankrupt. From the findings of the court entered at that time, it appears that counsel for appellant consented to that adjudication.

Pursuant to authority granted by the court, appellees employed auditors to audit the records of Barrett bonds affecting appellant's property as shown by the books and records of the Treasurer of the City of Hammond. An audit was made, and on the basis thereof appellee McLean filed his final report and petition for allowance of certain class 2 claims on September 7, 1955. By that report he proposed that claims upon special assessment bonds be allowed, and that funds be allocated therefor as follows: a. The sum of $382,989.63 to 310 claims on which the bonds had been produced and checked; b. The sum of $17,705.48 to 43 claims on which the bonds had not been produced and checked; and, c. The sum of $43,436.47 to remaining outstanding bonds and coupons upon the fifty assessment rolls upon which no claims had been filed. It was proposed that the latter two aggregate sums be paid to the Clerk of the Court for the use of bondholders ultimately entitled thereto.

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At this point in the case, appellant and some of its stockholders filed their objections to class 2 claims, which led to the order of March 5, 1956, and the first appeal as hereinabove related. *In re Woodmar Realty Co.*, 241 F. 2d 768.

On March 20, 1956, appellant filed a motion to vacate the order of November 22, 1941, and the findings of fact and conclusions of law entered October 29, 1952, insofar as it was there adjudicated that appellant was insolvent. That motion alleged that such orders had been procured by fraud; that appellees had been and were suppressing defenses and objections to class 2 claims; and that the motion was timely "because this is the first time that Woodmar and its stockholders have been prejudiced by" the orders of November 22, 1941, and October 29, 1952.

The latter motion was stricken on March 20, 1956, and though the appeal was taken from the order of March 5, 1956, it appears from our opinion in *In re Woodmar Realty Company*, 7 Cir., 241 F. 2d 768, that the March 20th order striking appellant's motion to vacate the 1941 order and the 1952 findings and conclusions was not then presented to this Court for review.

The history of events following the issuance of our mandate in the first appeal as hereinabove related, i.e., the selection of claim 441 for trial and the filing and withdrawal of the 1957 removal petition follow in sequence at this point and are pertinent. Finally, the amended petition under review followed.

From the foregoing summary of some pertinent parts of the record facts in this cause emerges a pattern of conduct which has characterized the actions of counsel

for appellant in this case for some ten years. Whatever may be said of the conduct of Surprise, Huebner and others prior to the hearings in 1951 and 1952, an able trial judge rectified the situation by the 1952 opinion and order. Though appellant expressly requested the court to find that this case had its inception in fraud and that a fraud had been perpetrated upon the court by Surprise and others, no finding of fraud was entered. On the contrary, the court expressed the opinion that the evidence failed to disclose that any prejudice resulted from the misconduct then disclosed. The record indicates that appellant and its counsel were then in accord with that conclusion, inasmuch as no appeal was taken from the 1952 decision, and thereafter, appellant, through its counsel, consented to the adjudication of appellant's bankruptcy and to continuation of the cause in bankruptcy pursuant to Section 256(2).

Notwithstanding that apparent accord, counsel has advanced the same charges of fraud in 1956 and 1957. Thereafter, on May 19, 1958, counsel for appellant stated in a pre-trial conference that there were no prior orders of court which he felt should be vacated because of elements of fraud alleged to affect the cause. Contemporaneously with that statement, the fraud charges were renewed by the 1958 petition which, as amended in 1959, is now before the court for review.

If nothing were here involved except the time element, there is a limit to the period of years over which the same dead horse may be beaten. The Surprise era of this case became final when no appeal was taken from the orders entered in 1952 and 1953 rejecting the contention that the adjudication of insolvency was obtained through fraud. The same contention was advanced and rejected in 1956, and no appeal was taken.

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There is, however, more involved here than the time element, namely, a vituperous tendency of counsel to read some heinous motive into the acts of anyone who dares to oppose him and of every judge who rules adversely to him. The record certainly supports the inference drawn in appellee's brief that the 1957 petition, which was withdrawn, was a warning to appellees to not interfere in the plans of appellant's counsel, and that the 1958 petition followed when that warning was not heeded. In that respect, we note that the 1957 petition was filed on the eve of the commencement of litigation upon appellant's objections to class 2 claims, that it was withdrawn shortly after the order of court which neutralized the trustee and his counsel insofar as the trial of the test case was concerned and within two days after the trial of the test case had been completed and that the 1958 petition was filed a mere matter of days prior to appellant's filing of settlement agreements which were the subject of the second appeal. *In re Woodmar Realty Co.*, 7 Cir., 284 F. 2d 854. We think that fact of timing is significant, and it is certainly consistent with the pattern which the record reveals of charging both the dead and the living with fraud whenever an adverse ruling is contemplated or becomes a reality.

Although formal charges are confined to the trustee and his counsel, appellant's brief reveals that the trial judges are not immune from similar attack. We abhor the insinuations that every trial judge, except the late Judge Parkinson, who has been burdened by this case since 1951, is either a blundering idiot, or, impliedly, a tool of some heinous scheme. Those insinuations cannot be justified by anything which appears of record. Moreover,

they are apparently motivated by the same lack of honesty which is apparent in the circumstances surrounding Judge Swygert's order disqualifying himself.(3)

Before leaving this phase of the case, we remark the ridiculous assertion that the fact that appellees propose to distribute substantial sums to class 2 claimants reveals a purpose to carry out a scheme devised by Surprise who proposed a similar distribution of assets in 1951. More must be said of this later, but the fact remains that Mr. McLean, as trustee, represents the creditors of appellant and his recommendations though yet neither rejected nor approved by the court below, appear on the surface to be a conscientious effort to recommend the allowance of claims which he believes to be valid.

The guilt by association allegations are followed by general allegations that appellees did not file objections to all of the class 2 claims, that they sought to suppress

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(3) Prior to his appointment to the District Court, Judge Swygert was a member of a law firm which had filed a class suit to forever close Barrett bonds upon one roll which included bonds which were a lien upon a part of appellant's real estate. He apprised all parties to this case of that fact shortly after the case was assigned to him, and he was then assured by Mr. Crumpacker, as attorney for appellant, that that fact constituted no reason for his disqualification. Notwithstanding that assurance, that fact was alleged by Mr. Crumpacker as the predicative basis for a motion asking Judge Swygert to disqualify himself, which motion was filed some five years later and shortly following the entry of the order of March 5, 1956, striking appellant's objections to class 2 claims. Although Judge Swygert denied that motion, he did, as related in the text of this opinion, thereafter disqualify himself upon his own motion and assign the case to Judge Parkinson.

defenses to those claims by filing the trustee's final report in 1955 proposing the distribution of a substantial part of the funds in the hands of the trustee in satisfaction thereof and that appellees sought to prevent appellant from protecting the estate against those lien claims by moving to strike appellant's objections thereto. It is contended that each of those allegations supports appellant's conclusions that appellees are continuing a fraudulent scheme which began with Surprise, et al.

At the outset we reject the frivolous assertion of supposed legal principle that it is the duty of a trustee in bankruptcy to object to every claim filed against the estate which he represents. The Act enjoins a trustee in bankruptcy to examine all claims and "object to the allowance of such claims as may be improper." 11 U.S.C.A. 75 A. (8). Actually, counsel apparently concedes that the duty to object, generally, attaches only with respect to claims which the trustee deems invalid, but he argues that objections must be made here because the claims are based upon liens of special improvement bonds which are said to be the obligations of the City of Hammond, not of appellant.

That asserted exception is a complete misconception in at least two respects. The obligation of these bonds became the personal obligations of appellant upon its execution of the installment-payment waiver and agreement. *Feder* v. *Gary State Bank*, Ind. App. 186 N.E. 379; *Central Bldg. & Loan Ass'n.* v. *Gary State Bank*, Ind. App. 186 N.E. 382; *Larimer* v. *Gary State Bank*, Ind. App. 186 N.E. 384; *La Plante* v. *Englehart's Estate*, Ind. App. 186 N.E. 385. Of greater significance, a trustee in bankruptcy represents every class of creditors of the bankrupt. He takes

the same property rights which the bankrupt owned and he is charged with a duty to discover and honor recorded liens upon the property in his hands. *In re Wakeen*, 7 Cir., 11 F. 2d 802, and he may be held personally liable for his negligence if he disposes of property in his hands without discovering the record fact of the existence of a valid lien upon that property. *In re Prather*, S. D. Ill., 138 F. Supp. 433; *Grodsky v. Sipe*, E. D. Ill., 36 F. Supp. 244. Filing of objections without legal basis therefor is never required.

The general allegation, actually an insinuation, that appellees did not file objections to class 2 claims is simply partly untrue in the light of record facts. Of the some 340 claims filed in the reorganization and the some 202 claims filed in bankruptcy after February, 1953, appellees obtained the disallowance of 442 class 2 claims as barred by the statute of limitations, or as duplicated claims, and the partial disallowance of 24 additional claims filed by former fiduciaries. Appellees recommended the allowance of the balance of the class 2 claims upon their reported determination that each was a valid and subsisting lien upon the funds in the hands of the trustee and not subject to any legal defense. We express no opinion as to the merit of the trustee's final report from which the latter recitals of fact are taken since that report has not been acted upon by the court below. Appellant, however, does not contradict the recited fact that a number of class 2 claims were resisted and disallowed, and the report stands of record as a refutation of the allegation that appellees objected to no class 2 claims.

What is said above applies with equal force to the general allegations that appellees sought to suppress defenses

to class 2 claims by recommending their allowance and by resisting appellant's efforts to object to such claims. The trustee's final report, which is yet pending, recites appellee's determination that no valid defenses could be made to the lien claims which he recommended for payment. The lower court's indicated decision of the test case, upon claim 441, which is now of record, suggests that Judge Tehan agrees with appellees that the objections to those claims which appellant asserts are without merit. We express no opinion upon that point, since that decision is not before us on review. We note the indicated decision only for its tendency to illustrate the gross absurdity of the contention that the machinations of some nefarious plot led to the trustee's recommendation that certain of the class 2 claims be allowed.

The attempt to inject some sinister connotation into appellee's attempts to foreclose appellant's claim of right to object to the improvement bond claims, is ridiculously frivolous. Judge Swygert sustained the motions by appellee, McLean, and others to strike appellant's objections, and Judge Finnegan, of this court, dissented from our decision reversing the judgment striking appellant's objections. The point is, if some sinister connotation must be attached to appellee's act in preparing and filing the trustee's motion to strike, the "sinister" view which prompted that act was shared by two very able jurists, who believed that the trustee's motion to strike was well founded in law.

Further specific analysis of statements contained in the removal petition could serve no purpose. We find nothing of substance in any factual averment, but a mass of conclusionary statements which lead invariably to

sel's vitriolic conclusions that appellees, who dare to oppose him, are guilty of heinous misdeeds.

We do note that counsel's statement that the 1958 petition and the amended petition were filed at the suggestion and direction of Judge Tehan is shown of record to be untrue. We approve the concluding paragraph of Judge Tehan's opinion, as follows, as a summary of the record in that respect:

> "My own personal experience convinces me that there exists a complete lack of good faith. I was appointed in this case in late December, 1957, and held a few days of pre-trials in January, 1958. At that time and subsequently, petitioner's counsel repeatedly and persistently made charges of fraud against practically all persons who were in any sense adverse to him. I cautioned him and then finally admonished him that I would no longer tolerate these unlawyerlike, abusive charges against fellow attorneys, who were the objects of his charges. In so doing I did advert to the elementary fact that there was a method and remedy, if he had a proper claim. It was only then, some ten months after he had withdrawn his charges that he refiled them. This period, from July of 1957 to May 19, 1958, is certainly a substantial period for a person professing to believe that a fraud is being perpetrated upon the court and his client, to withhold action. His assertion of these grave charges, withdrawal of it, reinstatement of it have more the aroma of a pressure tactic than a sincere and righteous concern."

Because we are convinced that the record in this case presents a contemptible, if not contemptuous, abuse of the legal processes of a federal court, we have dwelt at length upon a historical resumé of the record facts as they have come to our attention. We did that advisedly in order that

there may be no mistake that we are cognizant of the nature and severity of the question with which we deal. We find a sordid picture of the repeated use of ill-founded charges of fraud as a trial tactic which is foreign to established concepts of honest and ethical advocacy. We want it clearly understood that repetition of that practice as disclosed by this record will not be tolerated in the future.

Appellee's motion to file a supplemental brief was taken under advisement upon oral argument of this appeal. That motion is granted and the Clerk is directed to file the supplemental brief which was tendered to the court with that motion.

The judgment is affirmed.

A true Copy:

Teste: .....

Clerk of the United States Court of Appeals for the Seventh Circuit.

FILED
FEB 10 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1961

No. 665

WOODMAR REALTY COMPANY, a Corporation, Debtor,

Petitioner,

vs.

WALTER A. McLEAN, Trustee, and HERSCHEL B. DAVIS, Trustee's Attorney,

Respondents.

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In the Matter of the WOODMAR REALTY COMPANY, a Corporation, Debtor. } **In Proceedings for the Reorganization of a Corporation.**

On Petition For Writ Of Certiorari To The United States Circuit Court of Appeals For The Seventh Circuit

BRIEF OF RESPONDENTS IN OPPOSITION.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1961

No. 665

WOODMAR REALTY COMPANY, a Corporation, Debtor,

Petitioner,

vs.

WALTER A. McLEAN, Trustee, and HERSCHEL B. DAVIS, Trustee's Attorney,

Respondents.

* * * * *

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BRIEF OF RESPONDENTS IN OPPOSITION.

OPINIONS.

The opinions of the court below are correctly set forth in the petition.

JURISDICTION.

The jurisdiction requisitions are adequately set forth in the petition.

QUESTIONS PRESENTED FOR REVIEW.

The petitioner sets forth three questions presented for review. Actually there are only two questions. Questions 1 and 2 simply charge error in the ruling of the lower court in sustaining the motion to dismiss and in the ruling of the Court of Appeals in affirming this order. The question covering these two proposed points by the petitioner is simply this:

> "1. Did the Court of Appeals commit error in affirming the ruling of the District Court sustaining the Motion to Dismiss the Amended Petition to remove the court appointed trustee and trustee's attorney?".

Under question 3 the petitioner challenges the authority of the District Court to dismiss the debtor's removal petition without a hearing on the merits, as alleged punishment for contempt of one of the three lawyers who signed the petition. This question is not raised by the record which shows clearly that the petition was thoroughly examined and analyzed in both the District Court and Court of Appeals and was found wholly wanting in specific allegations charging fraud and misconduct. After deciding this point, on the merits, the court went on to point out that the petition was not filed in good faith and constituted a near contemptuous abuse of the processes of the Federal Court. In other words this question is:

"2. Where the court examines a petition which contains scandalous and unfounded charges of fraud, may it, after holding that by and large, the charges are not specific, and where specific they are refuted by record, go on and point out that the filing of the petition constitutes near contempt of court?"

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED.

The pertinent provisions of the constitution and statutes and rules are adequately set forth in the petition at pages 5-7, except that the rule under which the motion for dismissal was authorized was not set forth. This rule reads as follows:

> "Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted.'
>
> Rule 12(b) F.R.C.P.

CONCISE STATEMENT OF THE CASE.

This litigation involves the bankruptcy of a corporation engaged in the real estate development business in Hammond, Indiana. Originally, an involuntary petition, under Chapter X of the Bankruptcy Act, was filed in January, 1941. Practically all of the assets of the corporation consisted of 1540 contiguous parcels of real estate. Each of these parcels was encumbered by one or more special improvement liens arising out of the construction of streets, sewers, sidewalks, etc., for the improvement of said properties.

The amount of the liens on each lot is recorded in the Lake County Treasurer's record, a public record of which the Trustee must take notice.

When the Trustee took over the various lots of the bankrupt and sold them he took them subject to the public records in the Lake County Treasurer's office which showed the amount of the liens unpaid on each lot in question. Upon converting these lots to cash, he held the funds in trust for the benefit of the holders of these liens—whoever they might be.

All of the property owned by the petitioner corporation was sold prior to December 31, 1950, and by the former trustee, Charles L. Surprise, who was in office during that period. In each instance, except two, the sales were made free and clear of liens and the liens ordered transferred to attach to the proceeds of the sales. A number of the properties were sold to a corporation known as Home Builders, Inc., which it was alleged in a hearing before the Trial Judge Luther Swygert, was a subsidiary of the

sales agent, S. C. Ennis and Company; two were sold to Donald Gardner and A. Zilkey, members of the bondholders protective committee, and these facts were also brought to the attention of Judge Swygert. Each of these sales was approved and on the sales handled by S. C. Ennis and Company the court allowed the commissions. At no time since the present trustee has been in office has there been any petition filed by the bankrupt asking to have these orders set aside. In the course of the proceedings on three separate occasions the corporation was held to be insolvent. After lengthy hearings in 1951 and 1952, the matter was, early in 1953, put in straight bankruptcy. All of the assets of the corporation had by then been reduced to cash and there is at present $457,000.00 cash on hand which constitutes all of the assets of the estate. There were at that time liens of record against the property of the bankrupt of about $470,000.00.

The Petition to Remove was originally filed in June of 1957. The record shows that this petition was filed as a warning to respondents not to interfere with petitioner's counsel. This petition was filed 'on the eve of commencement of litigation upon appellant's objections to Class 2 claims, that it was withdrawn shortly after the order of the court which neutralized the trustee and his counsel insofar as the trial of the test case was concerned.' (opinion of Court of Appeals—Petitioner's Appendix, p. 22a). A new petition to remove was filed in June of 1958 after Judge Robert E. Tehan, who was then sitting as trial judge, ordered the petitioner's attorney to refrain from charging fraud and misconduct unless he was willing to file a verified petition charging the same. When the matter came on for hearing the trial judge ordered the petition particularized in keeping with Rule 9(b) stating that

in the interest of time, he was entitled to have compliance with the rule to the end that he might be apprised as to the basis of fraud and misconduct. The amended petition in question was filed about six months later. A motion to dismiss this amended petition was filed by the respondents on the ground that it failed to state facts sufficient to grant grounds of removal. This motion was sustained.

In this opinion the District Court Judge carefully discusses the allegations of the petitioner's amended petition for the removal of the Trustee and his attorney and points out that the amended petition does not allege fraud with particularity, as required by Rule 9(b), Federal Rules of Civil Procedure.

The trial court's opinion likewise reviews the conduct of the petitioner's attorneys over the years of the pendency of this proceedings, and the District Court Judge then finds that in his opinion the amended petition for removal was not filed in good faith.

The ruling of Judge Tehan sustaining the motion to dismiss did not state whether or not the dismissal was 'with prejudice' and no attempt was made by the petitioner to file an amendment to the petition dismissed or to file another amended petition. The petitioner stood on the ruling and took his appeal.

The Court of Appeals of the Seventh Circuit sustained the ruling of the lower court stating that the petition was wanting in sufficient allegations of fact to charge any acts of fraud. (See Petitioner's App., p. 7a). In the course of its opinion and after so finding, the Court of Appeals went on to point out, that from the facts disclosed, the petition was not filed in good faith. This petition for Writ of Certiorari follows.

ARGUMENT.

Introduction.

At the outset, we would call attention to the fact that much of Petitioner's Statement of Facts and Argument is devoted to the fact that this matter has been pending for over twenty years. In connection with this we would show:

1. Walter A. McLean was appointed Trustee in December, 1952 in corporate reorganization proceedings of the Woodmar Realty Company. In February, 1953, Woodmar Realty Company was placed in straight bankruptcy and Walter A. McLean was again appointed Trustee and Herschel B. Davis was named as his attorney. By September 1955 this involved matter was ready for final disposition and at that time the Trustee filed his Trustee's Final Report recommending allowance of the lien claims described therein and asked authority for their payment. Petitioners, the bankrupt, then appeared and filed objections to virtually all of the claims involved and its right to so object was then sustained by the Circuit Court of Appeals on appeal (*In re: Woodmar Realty Company*, CCA 7th Cir., 1957, 241 Fed. 2d 768). Thereafter, one claim; to-wit, Claim 441, was selected as a test claim to be tried to determine the validity of all of the bankrupt's objections to all lien claims. Trial was had on Claim 441 and on July 21, 1961, the District Court found against the petitioner herein on all of its objections to such claim, in effect holding that the petitioner's objections to all lien claims were without merit.

Had the petitioner herein not filed objections to all of the lien claims in 1955, the Trustee's Final Report which alleged that the bankrupt's objections to lien claims were invalid would then have been presented and this matter would then have been completely disposed of and this bankruptcy then closed.

2. We do not undertake to speak for the trial court and the Court of Appeals on the wild charges of delay but would point out that the delay was probably in its entirety due to reckless disregard of the petitioner for brevity and materiality in the pleadings he filed. The Amended Petition to Remove the Trustee herein in question is an example—46 printed pages in length and a Bill of Particulars of 100 pages. *Literally hundreds of petitions and motions have been filed by the petitioner within the last four years in this cause.* The petitioner filed a proposed special finding in the test case—Claim 441—85 pages in length. Incidentally petitioner states on page 20 of his petition that no appealable order has yet been entered on Claim 441. This is not true; Cause No. 13579, Court of Appeals 7th, is his appeal on this matter.

Six appeals have been taken by petitioner and nine petitions for Writ of Mandate filed against Judge Tehan. Delay there has been, but all brought about by petitioner himself.

I.

THE DECISION BELOW IS CLEARLY CORRECT.

Motion to dismiss must be sustained when there are only general allegations of fraud or the specific allegations are in conflict with the record.

The issue in the present case is simply this—Did the trial court err in holding that the Amended Petition to Remove the Trustee and his Attorney, 46 pages in length and buttressed by a Bill of Particulars of 100 pages in length, state facts sufficient to require the removal of the respondents from their respective offices?

The question of the sufficiency of the petition was raised by the filing of motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b) F.R.C.P.

Respondents urged that general allegations of fraud as were made in the petition herein against the respondents are not, under Rule 9(b) F.R.C.P., sufficient to withstand a motion for dismissal.

> "Allegations were made that leases had been acquired through 'gross misrepresentation and deceit' a fraud upon this court, and that the decree in New Mexico was brought about by the misrepresentation and deceit perpetrated by Ellis on the New Mexico court.'
>
> "The form of this allegation is wholly insufficient under Rule 9(b), which requires that all averments of fraud or mistake should be stated with particularity. We have here only a categorical assertion of fraud. Such an assertion of fraud amounts only to conclusion, which is not admitted on a motion to dismiss the present complaint."

Ruben v. *Ellis*, (CCA 5th Cir., 1953) 202 Fed. (2d) 415, 417.

In a similar case, the court stated:

> "The plaintiff avers a vicious conspiracy and collaboration between the defendants to prevent his collection of rentals; however, no factual allegation is made in support thereof. This allegation is much too vague and general and must fall since it is unsubstantiated by any facts disclosed in the pleadings."
>
> *Conner* v. *Real Title Corporation,* (CCA, 4th Cir., 1947) 165 Fed. (2d) 291, 294.

In keeping with the above rule, the motion to dismiss was, by the District Court, sustained with the following observation:

> "It clearly appears from what we believe to be a painstaking review, that the amended petition to remove trustee and trustee's attorney and to restore Woodmar to possession, fails to state facts warranting the removal of trustee and his attorney."
>
> Judge Tehan's Opinion, Appellants' App. Cause No. 13215, Court of Appeals, Pages 276 and 277.

After the District Court sustained this motion, which in effect admitted all facts pleaded (except general allegations of fraud and such allegations as were contradicted by the record in the case) the petitioner did not seek to file an amendment or another amended petition but appealed to the Court of Appeals on the order of dismissal rendered. The dismissal was silent as to whether or not it was "with prejudice", but the petitioner, within a certain time limit, and in lieu of an appeal, certainly had a right to file an amended petition charging new and different grounds, a right to which he did not avail himself (Moore—Federal Practice Vol. 3, pp. 838, 839).

When the court, after careful analysis of the removal petition, sustained the Motion to Dismiss, it in effect said: "Assuming that all you say is true, there is still

no ground for removing the respondents." Does petitioner contend that the court should take up its time to grant him an opportunity to prove facts which are admitted?

Instead of tendering amended petition the bankrupt appealed, and the Court of Appeals affirmed the decision of the District Court with the following observation:

> "We have reviewed the record and the amended petition carefully and are convinced that the petition is so wanting in sufficient allegations of fact as to present not even token compliance with the provisions of Rule 9(b) which require a pleader averring fraud to state 'with particularity' the circumstances alleged to constitute fraud."
>
> Petitioner's Appendix, page 7a.

The court thereafter carefully analyzed the petition and concluded:

> "If the amended petition has any factual basis whatsoever, it tends to state a charge not against appellees, but only a renewal of charges made at least as early as November, 1952, against the prior trustee, Charles L. Surprise, and other persons. Thus it is alleged that Surprise, and others, conspired to perpetrate a fraud upon the Court and appellant in order to obtain the initial finding of appellant's insolvency, to have themselves appointed as fiduciaries having control of appellant's property and thereafter to dispose of and distribute appellant's property to Class 2 claimants to their own benefit and profit.
>
> "The amended petition contains not a single allegation connecting either of the appellees with the alleged conspiracy and fraudulent conduct of those persons, except for the recited fact that appellee Davis was appointed by the court as co-counsel for Surprise in May, 1950, and served Surprise in that capacity until hearings were commenced in 1951, which ultimately led to the removal of Surprise as trustee. Upon that record fact hangs the tenuous allegation

that Mr. Davis became tainted by the alleged fraud of Surprise through that representation and that appellee McLean became likewise tainted through his association with Mr. Davis after Mr. McLean was appointed successor trustee.

"In his opinion dismissing the amended petition, Judge Tehan correctly and accurately concluded that such allegations were an 'obvious attempt to establish guilt by association', and that the allegations were refuted by facts found and adjudicated in this case. We approve those conclusions without reservation, and resort to the resume of the procedural history of the case which follows only because we think it necessary to document the evident fact of gross bad faith which characterizes these allegations."

Petitioner's Appendix, pages 13a and 14a.

The court then examined the record before in light of the amended petition and concluded:

"Further specific analysis of statements contained in the removal petition could serve no purpose. We find nothing of substance in any factual averment, but a wealth of conclusionary statements which lead invariably to counsel's vitriolic conclusions that appellees, who dare to oppose him, are guilty of heinous misdeeds."

Petitioner's Appendix, pages 26a-27a.

Clearly the court considered, and considered carefully, the amended petition and based its decision on the insufficiency of the same, not on the contemptuous conduct of petitioner.

Was there any charge that respondents were guilty of 'serving two masters'?

Lest there be any misconceptions that the Amended Removal Petition charged the trustee or his attorney with being in the employ of or a representative of any of the claimants herein as is apparently charged on pages 23

and 24 of his brief, we state unequivocally that there is no such charge contained in the Removal Petition. The thing he is complaining about is that the trustee has taken the position that he is the representative of all creditors, the secured as well as the unsecured, and it is his duty to recognize and recommend for payment claims which according to the public records and all known facts are valid and subsisting. The petitioner, on the other hand, claims that the owner of each bond and coupon must prove up in an adversary proceeding his liens and trace the funds available to his bond and coupon, thus imposing upon the claimants great labor and expense and eventually force them into a "poor settlement" rather than expensive litigation. The Court of Appeals sustained the trustee in his position in this language:

> "• • • a trustee in bankruptcy represents every class of creditors of the bankrupt. He takes the same property rights which the bankrupt owned and he is charged with a duty to discover and honor recorded liens upon the property in his hands. *In re Wakely*, 7. Cir., 11 F. 2d 802, and he may be held personally liable for his negligence if he disposes of property in his hands without discovering the record fact of the existence of a valid lien upon that property. *In re Prather*, S. D. Ill., 138 F. Supp. 433; *Grodsky v. Sipe*, E. D. Ill., 136 F. Supp. 244."

Petitioner's Appendix, pages 24a and 25a.

Petitioner takes the position that trustee must object to every claim and failure to do so puts him in violation of the dual capacity doctrine mentioned in *Woods v. City National Bank & Trust Co.*, (1941) 312 U.S. 262. In view of the above quotation this does not follow. On these facts the decision of the District Court was manifestly correct.

II.

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW.

Furthermore, it clearly appears that there is no important question of Federal Law requiring decision by this court. The question is particularly unimportant because under the Bankruptcy Act, Chapter X, sec. 160 (11 U.S.C.A. 560) "* * * the Judge at any time, without or upon cause shown, may * * * remove trustees and appoint substitute trustees."

Chapter II, sec. 2(a) (17) (11 U.S.C.A. sec. 2(a) (17)) of the Bankruptcy Act gives District Courts jurisdiction to "* * * upon their own motion, remove for cause receivers or trustees, upon hearing after notice; * * *"

Clearly it appears, therefore, how insignificant and unimportant is the ruling in this particular case since the law specifically states that the court may at any time remove trustees on its own motion and apparently for any cause that satisfies the court. Certainly if the trustee at any time proved faithless to his trust he could be summarily removed by the District Court, and the ruling on this petition would be no bar to such action.

III.

THERE IS NO CONFLICT OF DECISIONS.

The petitioner, on page 27 of his brief, charges that the ruling herein, dismissing the petition to remove is in conflict with the rule of the other circuits. As was hereinbefore pointed out the order was silent as to whether or not the dismissal was "with prejudice" and under the holding of the authorities cited in Moore's Federal Practice, 2nd Ed., Volume 3, page 839, there was a clear right to file an amended petition of which right he did not avail himself but chose rather to stand on the ruling and take

an appeal therefrom. Furthermore, as is provided in the Bankruptcy Act the court, of its own motion and without cause, could remove the trustee at any time.

Assuming, however, for the purpose of argument, that the order of the dismissal herein was with prejudice, the cases cited by the petitioner are not in conflict with the ruling of the Circuit Court herein. The petitioner cites cases from the Second and Fifth Circuits in support of his contention.

In the case of *Kohler* v. *Jacobs*, 138 F. 2d 440 (CCA 5, 1943) the court held on page 443 that the charge of fraud was alleged with sufficient particularity stating:

> "One has to search in these pleadings for particulars but they can be found."

In the case cited from the 2nd Circuit, *Levinson* v. *B. & M. Furniture Co.*, (CCA 2, 1941) 120 F. 2d 1009, the Court of Appeals held that the ruling of the trial court in refusing to dismiss a proof of claim was proper, stated that: "although the claim did not allege the fraud with as much particularity as desirable • • • since its general purport is plain enough the court below did not err."

In both of the Circuit Court cases it appears therefore that the pleading met the requirements of Rule 9(b), as interpreted below.

It is interesting to note that in one of the other cases cited by appellant in support of his contention of conflict, the court held that where, after ordering a bill of particulars, it appears that the claimant "can not put in plain, and precise terms the exact fraud that he is talking about, a motion to dismiss would be entertained." *U. S.* v. *Atlantic Pacific Iron Works*, (DC-ED N. Y. 1944) 53 F. Supp. 268, 272.

It follows therefore that there is no conflict with the ruling in the other circuits.

IV.

NO ESTABLISHED PRECEDENT WAS VIOLATED

The petitioner charges that the District Court violated established precedent by dismissing the debtor's petition without hearing as alleged punishment for contempt of the lawyer who signed the petition. This simply is not true. The decision of the Court of Appeals states:

> "We have reviewed the record and the Amended Petition carefully and are convinced that the petition is so wanting in sufficient allegations of fact as to Rule 9(b) which requires a pleader averring fraud to state with particularity the circumstances alleged to constitute fraud." (See also pages 11 and 12 of this brief.)

Clearly, the decision of the Court of Appeals is based upon the insufficiency of the pleading. It is true that the Court in its opinion then goes on to review the record and point out that the petition was not filed in good faith and that the petitioner's attorney was guilty of contemptuous or near contemptuous conduct, but it can never be said that the petition was dismissed because of this.

It is interesting to note that also in this court briefs shall be 'free from burdensome, immaterial, and scandalous matter'. Briefs not complying with this may be disregarded and stricken by the court; Rule 40(5). The Court of Appeals did not strike the brief of the petitioner or his petition but rather considered it very carefully, dismissed it as insufficient and then went on to point out that the filing of the petition with the scandalous and reckless charges therein constituted near contemptuous abuse of the processes of the court. Surely this is not contrary to established precedent.

CONCLUSION.

Wherefore, it is respectfully submitted that the petition for Writ of Certiorari be denied.

Respectfully submitted,

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